



Adjudications and Arbitrations

Volume 1 of 2 – [Buildings & Water works]

04 Case studies of Disputes

Eng. C. Wijayaratna

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PREFACE

Eng. Chandarasiri Wijayaratna, graduated from university of Ceylon Katubedda campus [presently Moratuwa University] in 1973 and commenced his Engineering career at Mahaweli Development Board. After six years, he joined private sector in consultancy services and construction companies and developed himself to a Construction Management Specialist as well as Arbitrator and Adjudicator.

I had opportunity to be associated with him as Dispute Adjudication Board [DAB] member and frequently to discuss the disputes to find most appropriate solutions.

During his career he always wishes to share his experience with his colleagues of young & old generations, in construction industry. He is very enthusiastic to disseminate his knowledge to young engineers, particularly in project management for their career development.

Most of the young and senior engineers encourage him to publish his wealth of knowledge in construction management, and dispute resolution, as guide lines to engineers in the industry.

As a result of these requests, he compiled his experience in simple and user-friendly manner to publish this book. All disputes in this book are real life dispute resolutions he faced, presented step by step for easy understanding of the reader. He was involved in almost all of these cases as consultant, arbitrator or adjudicator. This book contains analyses of situations to find solutions in appropriate manner.

This book is useful as a guideline, not only for Engineers but also for the quantity surveyors and contractors to enhance their knowledge to implement projects well.

Therefore, I am pleased to congratulate him for his dedicated contribution to construction industry to fill these gaps – a long term need.

Eng. Wimalasena Gamage

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C.Eng. HLF [IESL]; Past President of IESL

Retired Director of Irrigation [Major construction]

Arbitrator & Adjudicator

Foreword

My intention for writing this book is to provide an opportunity to the less exposed engineers in construction industry to understand the reality of possible failures in many claims, they may expect to win.

*Under FIDIC 4 and ICTAD Publication No. SCA/1, revised edition January 1989, the time for a claim notice or submission time is not rigidly fixed. The phrases “or as soon thereafter as is reasonable” for extension of time and **‘if the contractor has, at the earliest practicable opportunity, notified the Engineer in writing’ for claims**, was much used to submit late claims by contractors.*

But under **new** FIDIC contract conditions this is not possible. A delayed claim will not be accepted by the Engineer and hence the dispute board or the arbitrator, if the other party objects. and in ICTAD though it is a must, yet it is not stated that the entitlement is lost as seen from sub clause 19.1 different from the second paragraph of sub clause 20.1 in FIDIC

Disputes are not pleasant. However, if inevitable there is no other option than facing it.

If the party involved studies carefully the disputes, which are less likely for a favorable decision, a dispute need not be referred for resolution by Adjudication or Arbitration.

Dispute resolution is costly, time consuming and in my view is non-productive for engineers as they are trained to do more useful professional work for the society with their engineering capabilities, than claiming money for other parties.

However, situations do crop up, because the business world at large is not always reasonable in their dealings.

This book deals with resolutions of actual disputes, the author has associated in the capacity of Resident Engineer assisting the Employer, or as a member of a dispute board or arbitration tribunal, or as an independent advisor to state sector employers when his colleagues sought his assistance.

A dispute being a private matter between the parties, should not be divulged to others.

Because of this situation, it is very difficult to get a practical understanding, unless one gets an opportunity at least to read the submissions, proceedings and the decisions of a dispute resolution.

Accordingly, the author selects some [04] cases of which he has information in detail, to present each case as dispute between a Contractor, an Employer, associated with an Engineer decided by a dispute board or an arbitration tribunal. The time, location etc. of the project is not mentioned as most cases are on state sector projects, where the parties involved may be

identified by educated guessing. **Thus, the author does not contravene the legal requirement on confidentiality of documents which are their private and confidential matters.**

Any clause quoted from specifications and contract conditions will be within inverted commas or/and in italics, if felt needed to be included.

Decisions given may be different in similar disputes depending on circumstances – i.e., the specifications/contract conditions, submission and defense, supporting documents and the personal factor of the decision maker.

I estimably extend my gratitude to,

- Mr. Denzel Aponsu – the Resident Engineer under whom I worked as an ARE where I had first experience on contractor's claims and the discussions which first triggered an interest in this aspect of construction contracts in me, and
- the construction company [SGCC] which allowed me to study the whole set of documents of a previous arbitration they had, before I joined them, and
- the colleagues who sought my assistance as a senior engineer when they had dispute resolutions, and
- ICLP for selecting me for the diploma course after which I am professionally recognized in this field.

I, fervently hope this book will be useful to those who are keen to peruse this as a guidance, in order to avoid disputes, which are unproductive due to inclusion of imaginary issues in the hope of getting some compensation even by mistake, in the long run.

Most of the disputes involve

- Extension of time and related cost
- Disagreement on new rates for variations
- Interest payment for delayed payments

This volume 1 contains disputes related to buildings [03] and waterworks [01]. Matters related to road works numbering 09, as volume 2 will follow.

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25/02/2016 to 30/10/2023

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List of abbreviations

ADR	Alternate dispute resolution
BOQ	Bill of Quantities
CI	Cast iron
CIDA	Construction Industry Development Authority
COC	Conditions of Contract
DAB	Dispute Adjudication Board
DB	Dispute Board
DBM	Dispute Board Member
DD	Delay damages
DI	Ductile Iron
EOT	Extension of Time
ESR	Engineer Specified Rate
FIDIC	Federation Internationale Des Ingenieurs Conseils [<i>A French term for International Federation of Consulting Engineers</i>]
HO	Head Office
ICTAD	Institution for Construction Training and Development Authority
IPA	Interim Payment Application
IPC	Interim Payment Certificate
LD	Liquidated Damages
MOU	Memorandum of Understanding
OH & P	Overheads and profit
PD	Provincial Director
PS	Provisional Sum
S/S type	Spigot and Socket type
SAC	Statement at Completion
SBD	Standard Bid Document
SOC	Statement of Claim
SOD	Statement of defense
TO	Technical Officer
USD	United States Dollar

Chapter 1

The dispute:

The dispute consists of 08 referrals on various headings [they identified as separate disputes] but basically, on Liquidated damages, Delay in payment of monthly interim claims, Refusal of contractor proposed profit and overhead percentage and Payment of preliminaries, Extension of time, variations, and Additional overheads for delayed period etc. The remedy sought and award are given in table format at the beginning and the end of dispute analysis respectively.

The background:

The project is for construction of a building for a client department, which was supposed to do some arrangements for the construction and the chief secretary got the work through the buildings department as the Employer and the Chief Engineer buildings as the Engineer, for the contract. The contract document appears to be hurriedly prepared, with some matters undecided, as to who will do/ who will pay. After the initial allocation of funds, additional funds were to be provided by the client department, which regularly failed and payment delays were unavoidable towards the end. The client department, which agreed to get electricity connection, failed due to fund availability and coordination by correspondence. This caused delay in taking over and paying additional money for security personnel, until the building could be occupied. Some Special Conditions included in Contract Data, are very arbitrary, e. x. the profit and overhead percentage is fixed. Labor and material cost shall be, as in district buying committee rates, the technical staff to be engaged by the contractor paid under a preliminary item.

The contract conditions are, ICTAD/SBD /1 and the specifications are ICTAD/ SCA VOLUMES for buildings, water supply and roads

Contract administration too had lapses. Construction program itself had no critical path shown. The contractor has not requested for written instructions or confirmation of verbal instructions by the Engineer many times.

{Annexes are not included in the book to avoid identification of parties and the reader need not think of them even if, so mentioned in the descriptions}

About the project

- 1.1. The General Conditions of contract agreed is ICTAD SBD 01
- 1.2. Contract sum - 40million LKR
- 1.3. Date of commencement – 02/09/x
- 1.4. Date of initial agreed completion – 20/04/x+1

- 1.5. Actual date of completion – 28/10/x+2
- 1.6. Date of taking over – 24/11/x+2
- 1.7. Liquidated damages /day of delay - 0.05% of contract sum per day i. e. 20,000.00 LKR
- 1.8. Maximum value of LD 10% of contract sum

Letters x, x+1 etc. denote the years of the project period from start to end

Remedy sought

The claimant has listed as the summary in the statement of claim [SOC] page 12, in table form, the eight disputes as listed below.

Dispute No	Description in brief	Amount claimed million LKR
1	Liquidated damages were imposed and released without compensation	0.003
2	Interim bills were honored very lately causing financial losses	0.62
3	Refusal to accept our Overhead & Profit component in our estimate	
4	All our variations are to be considered as compensation events and payments shall be made accordingly	2.72
5	Price escalation during the extended period	0.11
6	Release of retention money	1.09
7	Additional overheads incurred as a result of extension given	9.73
8	Refusal to make payments under preliminaries	0.81
Total		15.08
During the adjudication process parties agreed to add one more dispute subject to PD's consent which was submitted later		
9	Payment for the security arrangement made after the completion of the project due to some delay in the taking over by the client department authorities	0.42
	Total	15.50

1. The submissions

- 1.1. 'PS Co. Submitted the statement of claim [SOC] for the remedy sought as above, dated 08/12/x+3 having signed the consent letters for selection of Eng. X. as the Adjudicator on 24/Nov/x+3
- 1.2. Statement of defense [SOD] was submitted dated 03 January x+4 by the respondent namely Eng. Mr. E on behalf of the Provincial Director Buildings Department
- 1.3. Reply to SOD was submitted dated 20/Jan/x+4 by the claimant
- 1.4. Rejoinder was submitted by the respondent dated 09/Feb./x+4
- 1.5. Issues and admissions were submitted by the claimant and the respondent on 14 Feb x+4. These were agreed by the parties including clarifications raised by the adjudicator at the meeting held in a private meeting hall, on 04/May/x+4
- 1.6. Further clarifications were submitted by the parties as requested by the adjudicator after the hearing when some missing information were observed by the adjudicator

2. About the hearing

- 2.1. Preliminary meeting was held on 24/Nov./x+3 to agree on a tentative program for submissions and conducting the adjudication process
- 2.2. The parties for the dispute arranged the venues for the hearing
- 2.3. One sitting was held on 04/May/x+4 to agree on issues and admissions, the hearing was done on 02/June/x+4,
- 2.4. Secretarial works of the proceedings was by the Adjudicator as agreed by all for convenience of travelling less
- 2.5. Any missing documents were allowed to be submitted immediately after the hearing before the proceedings are sent to the parties for correction
- 2.6. Corrected and agreed proceedings were signed by the adjudicator and the parties
- 2.7. Parties requested for money value rather than the decision with guidelines for calculation to be done by the Engineer and the adjudicator agreed informing extra time and cost for providing such details

3. Admissions

- 3.1. Final certificate of completion, after the defects- liability period, was issued on 30/12 /x+2
- 3.2. First half of retention money was paid on time
- 3.3. Second half of retention money is not paid yet

- 3.4. Payment on completion is LKR 39.7 million covering work under BOQ, Variations, price escalation and preliminaries for the extended period
- 3.5. Adjudication agreement was signed by the parties and the Adjudicator effective from 27 October x+3, to resolve 08 disputes as given in table under remedy sought
- 3.6. Variations were issued according to sub clause 39.1 and 39.2 of COC
- 3.7. Claimant has been paid all variations on his statement at completion [annex 4G4 to 4G18 of SOD]
- 3.8. Claimant has been paid price adjustment for the compensable period, with the statement at completion
- 3.9. The claimant is entitled to, incurred losses in administration process during the extended period of the project; claim should be submitted with documentary evidence of the losses for the reimbursement
- 3.10. The period of Employer's risks was calculated according to dispute 5 of SOC and paid with statement at completion

4. Issues

4.1. Claimant's list of issues

4.1.1. Dispute 1

- 4.1.1.1. Liquidated damages were imposed and released without paying compensation
- 4.1.1.2. Right To Information act [RTI Act] clause 4 of part 1 prevails in deciding rate of interest

4.1.2. Dispute 2

- 4.1.2.1. Interim claims were honored very lately, causing financial losses
- 4.1.2.2. RTI act clause 4 of part1 prevails in deciding rate of interest

4.1.3. Dispute 3

- 4.1.3.1. Respondent/Employer has included a new clause in the contract, contrary to CIDA circular to adopt overhead and profit component for grade 4 contractors
- 4.1.3.2. We seek approval of our claim of 26% as OH &P

4.1.4. Dispute 4

- 4.1.4.1. All variations are to be considered as compensation events and payment shall be made accordingly
- 4.1.4.2. Variation orders were not given in writing, but verbal and some through log book
- 4.1.4.3. Material price shall be the market price and unless the respondent submits valid document for his purchase, his adopted price becomes null and void
- 4.1.4.4. Interest calculation shall be at a rate decided by the adjudicator

4.1.5. Dispute 5

- 4.1.5.1. Price escalation has to be paid for the extended period
- 4.1.5.2. Balance payment amount shall be corrected from 130,000.00 to 139,500.00
- 4.1.5.3. The disruption is due to corona effect and after 19/06/x+2 due to delay in electrical layout drawing received on 17/06/x+2
- 4.1.5.4. Interest calculation shall be at a rate decided by the Adjudicator from 09/04/ x+3

4.1.6. Dispute 6

- 4.1.6.1. Release of retention money with interest @rate of 18 % applicable after the contract period

4.1.7. Dispute 7

- 4.1.7.1. Extensions are given in 6 stages
- 4.1.7.2. The value of extra works given is about 3.3 million
- 4.1.7.3. The extra overheads cost is not covered by this work as a long time has taken to complete the works
- 4.1.7.4. Mode of calculation by the respondent for additional overheads incurred as a result of the extensions, is not acceptable

4.1.8. Dispute 8

- 4.1.8.1. The Engineer unilaterally decided not to pay the preliminaries
- 4.1.8.2. Preliminaries to be honored for the full construction period

4.2. Respondent's list of issues

4.2.1. Dispute 1

- 4.2.1.1. Are there any rightful possibilities to the claimant to disclose an Adjudicator's decisions of other ADR processes, without obtaining any prior written approval of the parties of those ADR processes?
- 4.2.1.2. Does any institution have authority for interpretation of interest rates, other than Central bank of Sri Lanka?

4.2.2. Dispute 2

- 4.2.2.1. Does the claimant accept CIDA's SBD documents are mandatory to be used in this ADR process?
- 4.2.2.2. Has the claimant a right to amend the sub clause 43.1 and 43.2 of COC without prior written approval from other party or signing a MOU

4.2.3. Dispute 3

- 4.2.3.1. Does the claimant accept the legality of the document signed by both parties and the contents?
- 4.2.3.2. Is there any provision in this contract for the overhead and profit component other than sub clause 40.2 of COC? Respondent admits to pay for all variations only according to sub clause 40.2 of conditions of contract.
- 4.2.3.3. Does the contractor amend sub clause 40.2 of contract DATA without prior written approval of the Employer?
- 4.2.3.4. Both parties agreed to this clause for paying 14 % as overheads and Profit at the time of signing the contract. There is no other clause in the contract to differ this agreed rate of 14%

4.2.4. Dispute 4

- 4.2.4.1. Can the claimant prove any of the variations are under the compensation event, which are scheduled in clause 44 of COC?
- 4.2.4.2. Has the claimant any authority to change sub clauses of COC agreed by both parties, on his own? Engineer's determination of assessing quotations is according to sub clause 40.1, 40.2, and 40.3, including contract data relevant to these.
- 4.2.4.3. When was amendment on sub clause 40.2 and 40.3 of contract DATA, done by MOU or by agreement?
- 4.2.4.4. Compensation events are scheduled under clause 44; Sub clause 40.2 and 40.3 are valid. Claimant has to prove otherwise. Claimant has been paid all variations in Statement at completion [SAC]

4.2.5. Dispute 5

- 4.2.5.1. Had the claimant accepted his self - declaration on dispute 5 of SOC for the compensable delay by Employer?
- 4.2.5.2. Does the claimant not accept Covid-19 pandemic and April bomb blast are Employer's risks stated in dispute 5 of SOC?
- 4.2.5.3. The EOT given is Engineer's assessment not based on any analysis, as the critical path is not shown in the approved program
- 4.2.5.4. The EOT letters show compensable and other days separately in table 2 of SOD page 6. Price escalation is paid as per sub clause 47.1. The claimant has been paid for the compensable period, in the statement at completion [SAC]
- 4.2.5.5. Respondent has offered to pay 139,500.00 LKR as price escalation in SOD as the last line under dispute 5 in page 8

4.2.6. **Dispute 6**

- 4.2.6.1. Second part of retention will be paid; but is there any possibility to amend the interest rate in sub clause 48.2 of COC by the claimant, without prior approval by of Employer and CIDA?

4.2.7. **Dispute 7**

- 4.2.7.1. Is the claimant having any experience to claim compensation without supporting material/documents?
- 4.2.7.2. How could the claimant claim as overhead component, which is already in unit rate of BOQ?
- 4.2.7.3. Does the claimant understand overhead component and additional administration cost for extended period?
- 4.2.7.4. There are compensable events and others for which EOT is given
- 4.2.7.5. The Engineer has clearly informed in the EOT approval letters that the contractor is not entitled for any other compensation
- 4.2.7.6. The claimant should show actual overhead cost lost, according to audit statements of his institution, **during the extended compensable period, as accepted by him under dispute 05 in SOC**

4.2.8. **Dispute 8**

- 4.2.8.1. Had the claimant breached his own statement in dispute 5 of SOC for Employer's risk?
- 4.2.8.2. Does the claimant expect to claim compensation for his negligence?
- 4.2.8.3. "The respondent has accepted various weights of responsibility of Employer's risk, which were stated on claim under dispute 05 of SOC. Hence the respondent has accepted compensable period for 275 days". This had been paid with statement at completion
- 4.2.8.4. Therefore, the claim is null and void

5. **Proceedings**

As the proceedings are not lengthy the author included it for any inexperienced reader to feel how it is

5.1. **Dispute 1 –Payment of interest for late payments**

- 5.1.1. Parties agreed in principle for the payment of interest
- 5.1.2. Rate of interest was disagreed by the parties and the respondent insisted the rate shall be as per sub clause 43.1 of COC; Rate of interest shall be as given in central

bank bulletin. The claimant insisted that the clause 4 of part 1 in right to information [RTI] act.

- 5.1.3. The respondent pointed out that quoting others' adjudication decisions without approval from the parties is wrong and the adjudicator confirmed it
- 5.1.4. When no agreement to change clauses is reached by the parties, [in a MOU] the clauses in the contract should be adhered to.
- 5.1.5. The adjudicator will decide on the rate of interest to be adopted
- 5.1.6. The item for which interest payment was requested is the Liquidated Damages imposed and repaid later

5.2. Dispute2 – Payment of interest in delayed payments

- 5.2.1. Item of concern is, delay in interim payments
- 5.2.2. Parties agreed in principle for the payment of interest
- 5.2.3. Rate of interest was disagreed by the parties and the respondent insisted the rate shall be, as per sub clause 43.1 & 43.2 of COC; Rate of interest shall be as given in central bank bulletin. The claimant insisted that the clause 4 of part 1 in right to information act
- 5.2.4. **The adjudicator will decide on the rate of interest to be adopted.**

5.3. Dispute 3 – Refusal to adopt contractor proposed overhead and profit components for variations

- 5.3.1. In this contract, rate break ups of the item costs were not requested or agreed and thus, the profit and overheads- site / main office, are unknown separately before variations are ordered to decide, other than adopting 14 % fixed in contract data, which the contractor is not happy to adopt after the initial contract period.
- 5.3.2. Contractor /Claimant accepted 14% overhead factor for variations 1 and 2 before 20/04/x+2 [original contract period]
- 5.3.3. Claimant is entitled for OH &P factor of 30% as per CIDA prescribed rate for Grade 4 contractors. Based on analysis by buildings department this value is 26% [SOC]
- 5.3.4. Standard bidding document cannot be changed by the users as per CIDA press statement on 26/05/x+2 and on 09/11/x+3
- 5.3.5. CIDA approval of sub clause 40.2 has not been given by the respondent [SOC]
- 5.3.6. The respondent stated that, contract document signed by the parties is legally binding the parties
- 5.3.7. There is no provision other than sub clause 40.2 in COC for OH &P and there is no agreement by the parties to change what is in contract data for sub clause 40.2
- 5.3.8. The adjudicator explained it is wrong to change the clause in the standard document but particular conditions/contract data can be added to suit the individual contract

because all contracts cannot be administered in the same way and the Employer has the right to add any change in the contract data, provided they are not wrong as per unfair terms contract act.

- 5.3.9. Also, the adjudicator stated such fixing of OH&P for competitive bidding is improper but does not fall *within unfair terms contract conditions specified situations as parties have prior knowledge and agreed for the condition.*
- 5.3.10. Particular conditions/contract data are valid for the signed contract only.
- 5.3.11. Once EOT was granted, Conditions of Contract and particular Conditions/contract data remain the same, was the stand of the respondent.

5.4. Dispute 4 – All variations are to be treated as compensation events and payments shall be made accordingly

- 5.4.1. Variations were issued verbal or written by contractor and confirmed by the Engineer
- 5.4.2. New rates were submitted and work was started and allowed before rate approval by the Engineer
- 5.4.3. Many months later [not all variations] the Engineer approved; rates much lower than the contractor's cost
- 5.4.4. The Engineer has followed sub clause 39.1 and 39.2 to issue variations
- 5.4.5. The contractor /claimant submitted quotations as per sub clause 40.1. The Engineer did not follow 40.1 to assess before ordering to start work in assessing the contractor's rates. The respondent stand is that the time frame only was not maintained in new rate approvals.
- 5.4.6. The Engineer followed sub clause 40.2 and 40.3 in assessing the quoted rates.
- 5.4.7. Respondent states that the variations are not compensation events under clause 44
- 5.4.8. Respondent questioned whether sub clause 40.2 and 40.3 are amended by agreement between the parties to disregard the clauses.
- 5.4.9. The claimant has been paid the variations in 'statement at completion' [SAC]. Claimant informed out of 29 variations, 6 Nos. are not paid and others are paid as determined by the Engineer.
- 5.4.10. Unpaid ones are;
 - 5.4.10.1. ESR7 - Supply and fix additional electric water pumps – paid at BOQ rate for the new 2Nos. The rate of purchase is high as per contract the value is below 1% of contract sum to change the rate – Respondent
 - 5.4.10.2. ESR8- Changing color of the columns and beams after painting is done. Contractor asked for payment for first painting and changed painting on the same area. The Engineer did not consider it.

- 5.4.10.3. ESR13 – site clearing in landscape areas. The work done is excavation of 150 mm depth before surface preparation of land for grass and flower plants. It has been paid on SAC as Day works.
- 5.4.10.4. ESR 14 - additional ¾ inch dia. pipe laying outside the building for water line connection is included in BOQ item according to the respondent.
- 5.4.10.5. ESR15- Excavation part of pipe line where excavation of about 40 m is involved out of which about a 4 m section is through macadam road surface. Item is included in BOQ item at SAC according to the respondent.
- 5.4.10.6. ESR 21/22/23 - transport cost of concrete flower pots and curved curbs. Engineer has considered all to be done in one trip – The Adjudicator asked to submit dates of work items done, dates of transport with support details if not given in the submissions. [ref. 4G13, 4 G14 of SOD; for support documents for work dates and supply dates]
- 5.4.11. The adjudicator explained that this dispute has arisen because,
 - 5.4.11.1. The work has been started before approval of rates.
 - 5.4.11.2. Even if the approval is late had it been acceptable to the claimant, it would not have been a dispute
 - 5.4.11.3. The Engineer has the right to determine under sub clause 40.2 40.3
 - 5.4.11.4. Contractor has the right to refer to the adjudicator if the Engineer determined rate is not acceptable
- 5.4.12. **So, the situation here is for the adjudicator to determine a reasonable rate.**

5.5. **Dispute 5 – Price escalation is not paid during extended period**

- 5.5.1. On adjudicator's clarification the claimant sent a copy of extension letter sent by PD; reference 01-18 dated 12/10/x addressed to Chief Engineer with a copy to state the 6th extension time is up to 31/10/x+2 with a copy to the contractor.
- 5.5.2. The claimant has been paid price escalation with the statement at completion
- 5.5.3. The respondent agreed to pay the requested amount of 139,500.00 LKR
- 5.5.4. So, the matter is settled without adjudicator's intervention

5.6. **Dispute 6 – The Second half of retention money is due on 30/11/x+3 which is not paid**

- 5.6.1. The respondent agreed to release it with interest
- 5.6.2. The adjudicator said interest for all payment delays after the initial contract period shall be at legal interest rates; not what are agreed in the contract

5.7. Dispute 7 - The additional overheads during the extended period to be paid

- 5.7.1. The respondent agreed to pay additional Costs. The word Cost is emphasized in clause 40.5
- 5.7.2. The adjudicator explained the overheads and profits are anticipated profit factor + site overhead, of which part is covered by the preliminaries, which are mostly time based and HO overhead component, which is a portion of HO cost for each project the contractor is handling during a particular period
- 5.7.3. Therefore, the site overhead is covered in work items and the preliminaries. As time-based preliminaries are to be paid in the extended contract period, only the HO overhead component is, that is due to the contractor during the extended period.
- 5.7.4. If the contractor can submit the audited statement to prove this, as agreed by the respondent this amount can be paid. The respondent also looks into the submission and ensures that the number of projects in hand of the contractor and their stage of completion are correct to assess the actual Cost of HO overhead for this contract

5.8. Dispute 8 – Refusal to pay preliminaries during extended period.

- 5.8.1. Respondent called attention of the adjudicator to table 2 of SOD summary of EOT letter and that the compensable delays and others are shown by the Engineer in the letters that, out of 18 months 10 months are compensable. The Contractor is paid preliminary for 10 months beyond the original contract period at SAC, as stated by the respondent.
- 5.8.2. The adjudicator stated that if the compensable and other are not stated in EOT letter and given blank, the preliminaries are to be paid for the full extended period
- 5.8.3. The respondent was of the view that when extension is given, it is as per the agreed contract and the conditions of contract are valid for the full project completion

5.9. Dispute 9. The claimant asked for another dispute [No.9] they have missed to include on ENGAGING 02 SECURITY PERSONS FROM 28/10/x+2 to 15/03 /x+4

- 5.9.1. The adjudicator said if it is on the employer's request it has to be paid. If the parties agree only the adjudicator can agree to add to this adjudication.
- 5.9.2. The representative Chief Engineer agreed, to discuss with the Employer and confirm by 27 Friday by e mail to the adjudicator
- 5.9.3. Relevant letter copies of contractor/claimant's cost proposal, Engineer's recommendation and the Employer's corrected rate etc. were given to the adjudicator, for in case accepted to be included in the determination. The Employer accepted to pay for the actual days based on attendance of security personal.
- 5.9.4. Due to the ending of agreed lists of issues, the sitting was adjourned at 2.00 p.m.

Prepared by adjudicator

Agreed by Mr. P for PS Co. - claimant and Mr. E for PD on behalf of respondent

6. Dispute analysis

6.1. Dispute 1 - Liquidated damages were imposed and released without compensation

6.1.1. Respondent agreed to pay the amount claimed

6.1.2. Adjudicator's decision – Pay LKR 3,098.00 as **claimed**

6.2. Dispute 2 Interim bills were honored very lately causing financial losses

6.2.1. Respondent agreed to pay the amount claimed

6.2.2. Adjudicator's decision – Pay LKR 618.000.00 as **claimed & agreed**

6.3. Dispute 3. Refusal to accept Overhead & Profit component in our estimate

6.3.1. Adjudicator's reasoning

6.3.1.1. This 14 % is not a part of a general clause, which has to be abided by the parties until the closure of the contract by completion or termination

6.3.1.2. This is a condition included by the Employer in contract data, valid for this contract only. It is not a generally accepted figure for the construction industry

6.3.1.3. The contract period is also a time fixed by the Employer in contract data

6.3.1.4. The parties have agreed for all these conditions and halfway a party cannot change these on his own and ask for new conditions unless agreed by both, by way of MOU or otherwise

6.3.1.5. Approval of EOT is one such situation when the contractor makes request to change what has been agreed and under clause 28 the Engineer recommends and the Employer agrees. No MOU is signed but parties agree to abide by

6.3.1.6. Fixing OH &P by the Employer is wrong in principle of competitive bidding, but if parties agreed it should be honored.

6.3.1.7. The parties expect the contract to be completed in the agreed period and other relevant conditions in contract data too, should be valid for that period

6.3.1.8. Therefore, if the parties agree, the initially agreed OH & P factor valid for the agreed contract period, too may be changed

6.3.1.9. All variations should be initiated by the Engineer as an instruction or request for a proposal from the contractor for the contractor to commence work. [Clause 39]

6.3.1.10. The contractor can give notice to the Engineer on a variation request about his problems in carrying out a variation [sub clause 39.3]

6.3.1.11. Both the parties have not followed contractual requirement EXACTLY. Hence a dispute has arisen

6.3.1.12. The Engineer has authority to determine rates for variations under clause 40.

6.3.1.13. The contractor too has the liberty to disagree on Engineer's determination and seek remedy under sub clauses 24 and 25

6.3.1.14. The adjudicator decides on these, whether the variation order is issued as per contract, or carried out and had become variations, the adjudicator will consider them to decide contrary to 40.2 in contract data IF AND ONLY IF the variation had effect after the original contract period, only BECAUSE fixing of rates by the Employer is contrary to principle of competitive bidding

6.3.2. Adjudicator's decision

6.3.2.1. All new rates effective after the initial contract period shall be corrected disregarding 14% limitation

6.3.2.2. All work instructed or having effect of commencing after the initial contract period, the rates should be paid at amended rates as listed below. The profit and overhead factor shall be 26% as requested because the common OH & P percentage in construction industry varies from 20% to 35% [or 40 percent on higher side depending on difficulty of site condition and complexity of work etc.]

6.3.2.3. The amount to be paid including interest is as given under dispute 4 as this situation arises for variations.

6.4. **Dispute 4. All variations are to be considered as compensation events and payments shall be made accordingly**

6.4.1. Adjudicator's reasoning

6.4.1.1. The Engineer has followed the contract clauses to the word in his determination

6.4.1.2. The contractor has the right to disagree but he has to comply with Engineer's decisions not to disrupt the progress and the continuation of the contract

6.4.1.3. The contractor has the right to refer any matter under the contract for dispute resolution and the adjudicator or the arbitrator can overrule the Engineer's determination.

6.4.1.4. As the parties have agreed, all these should be adhered during agreed contract period. After that, the contractor can make a request and the parties MAY agree for suitable practical values

6.4.1.5. As explained in dispute 3 above the Employer fixing rates as a condition is against the principle of competitive bidding. If so, the Employer can fix rates and engage selected contractors to work as the Employer needs, which is generally practiced in small and odd works to be completed soon

6.4.1.6. So, the rates are to be amended using average of the contractor's quoted figures and the district price committee rates to arrive at a fare basic rate only for items effective after the initial contract period.

6.4.1.7. Profit and overhead factor too can be adjusted for these as explained in dispute 3 above

6.4.2. Adjudicator's decision

6.4.2.1. The rates corrected by the Engineer for those commenced after or the instruction given for different work for which new rates are already agreed. The amendment shall be using average of contractor quoted rates and district price committee and day works rates as done by the Engineer to achieve the basic cost

6.4.2.2. Use the OH & P factor as 26 % as requested by the claimant and is accepted by the Adjudicator

6.4.2.3. Separately discussed ESR items

6.4.2.3.1. ESR 7; Supply and fix electric pumps – The number is increased to 3 from 1 in BOQ. Respondent pointed out though the quantity change is accepted; the price change is not 1 percent of contract sum to consider a new rate. **THE OBJECTION IS UPHELD. No extra payment possible**

6.4.2.3.2. ESR 8; Color changes instructed after the first coat of paint is done - **Contractor's cost should be paid for one coat i.e., 50% rate x area involved**

6.4.2.3.3. ESR 13; Site clearing - extra excavation for turf etc.; Respondent's stand was that site clearing after works is an item in BOQ. There is an item for preparation of surface for plants and turf. **The rate is fixed on same principle and multiplied by the quantity in the payment sheet**

6.4.2.3.4. ESR 14; $\frac{3}{4}$ "PVC line – Respondent's stand is the item is paid at BOQ rate. The claimant explained the work situation is different as excavation is involved. **The adjudicator used the same principle as both parties have submitted break up of rates**

6.4.2.3.5. ESR 15; Respondent stated the excavation part is paid at BOQ rate. **The claimant should accept this. NO NEW RATE IS ALLOWED BY THE ADJUDICATOR**

6.4.2.3.6. ESR 21, 22, & 23; Transport of items taken together by the Engineer for flower pots etc. appears arbitrary

6.4.2.3.6.1. For item 22; **the ADJUDICATOR derived a rate using cost of the items as per invoice and as claimed taking into consideration and sundry costs are allowed as a percentage**

6.4.2.3.6.2. For items 21 and 23; **the Engineer has given rates and hence same principle of averaging as for others had been used**

6.4.3. The total amount to be paid including interest is **746,000.00** LKR

6.5. Dispute 5. Price escalation during the extended period

6.5.1. Adjudicator's reasoning

6.5.1.1. Price escalation should be paid if EOT is given

6.5.1.2. Price escalation or any compensation does not become a right, just because EOT is given

6.5.1.3. The Respondent stated that the EOT analysis is given in page 6 of SOD in table 2. But this is a submission for the dispute resolution not a contemporary record
PARTIES SHOULD NOTE THAT CONTRMPORARY RECORDS ARE THOSE OFFICALLY KEPT BY THE PARTIES DURING THE CONSTRUCTION TIME NOT THOSE DOCUMENTS PREPARED DURING THE DISPUTE RESSOLUTION PROCESS WHICH ARE SUBMISSIONS ONLY. CONTEMPORARY RECODS WILL ONLY BE CONSIDERED AS SUPPORTING DOCUMENTS OF THE EVENTS THAT TOOK PLACE

6.5.1.4. The contemporary record here is, the EOT approval letter. In these letters the compensable events and others are not separated out. But the reasons are given in general.

6.5.1.5. The respondent's argument whether these are Employer's risk or compensation events as per the contract conditions is a valid question.

6.5.1.6. Summary of EOT approval letters PREPARED by the ADJUDICATOR is given below

Reference: Annexure 5A, 5B and so on in SOD			
EOT No.	Delay Reasons in letter	No of days allowed	Remarks
01	Handing over the site	01	Seasonal rain is not a compensation event. Only unusual rain can be considered But EOT has been given
56 days from	Removing trees	08	
20/04/x+1	Structural drawing delay	02	
	Seasonal rain	45	
02	Shortage of labor	21	Whether these situations occurred with overlap or separately is not given
70 days	Situation in the country	21	
From 15/06/x+1	Sand and timber shortage in the district	28	
03	Material shortage - Timber	28	
63 days	- Fine sand	21	

From 28/08/x+1	- labor	14	Same comment as above for EOT 2 but with the condition “no other compensation”
04	Material shortage - Timber	49	Same comment as above for EOT 2 but with condition “no other compensation” <u>This EOT is starting from 25/08 and EOT 3 is from 28/08 so there is an overlap</u>
147 days	- river sand	21	
From	- labor	21	
25/08/x+1	Situation in the country after April blast	28	
	Payment problems IPC 7 and 8	28	
05	Payment delays IPC 7 & 8 Already allowed in EOT 3		with condition of no other compensation
208 days	Allowed balance in this EOT	28	
allowed		161	
Up to 18/06/x+2	Delay in approval of electrical line diagram	47	
06	Continuing Covid 19 situation	92	with condition of no other compensation
104 days up to 01/10/x+2	Delay in approval of electrical line diagram	12	
07	There is no separate EOT request 7 or EOT approval 7 in the annexure of SOD. But there is an EOT request 6 which should be 7 as EOT 6 date is 14/08 2020 and this letter date is 18/09/2020		
	Financial fluctuations effect on aluminum and elect. fittings		None of these reasons can be considered as compensation events as per the contract
	Shortage of paint items		
	Difficulty in getting motor and plumbing items		
	Labor shortage due to safety problem of corona contact		
	Though there is no letter attached for approval, the table in page 7 of SOD gives the same reasons and allows 34 days		

6.5.1.7. Sub clause 44.1 lists out compensation events. Accordingly, a) delay in giving possession of site d) delay in issue of drawings, specifications or instructions f)

Engineer instructing for dealing with an unforeseen condition i) delay in issuing monthly Payment certificates are possible relevant situations in this dispute

6.5.1.8. Therefore, compensation events are covered in

6.5.1.9. EOT 1 - 11 days, EOT 2 - zero, EOT 3 - zero, EOT 4 - 28 days, EOT 5 - 161 + 47 days, EOT 6 - 12 days respectively

6.5.1.10. The reasons for delay in EOT 6 are delay in instructions and delay in payments.

These compensation events are occurring at the very end of the project period during extension. Thus, the contractor's entitlement comes to the end of the total allowed EOT, even if the Engineer has written 'no compensation'

6.5.1.11. If a compensation event occurs during LD period, the time extension will have to be given to the end of the event. So, the compensation has to be allowed up to the end of EOT 6, i. e. 01/10/x+2. But, as per 5.1.4 above, [ref PD's letter] The Employer's decision prevails over the Engineer's recommendation hence the date as approved EOT shall be 31/10/x+2

6.5.1.12. In reply to SOD, the claimant has accepted the respondent's offer but has requested payment of interest at 18% per annum. **As the respondent offer is accepted by the claimant + interest, the agreement is upheld by the adjudicator.** However, 139,500.00 has been calculated by the adjudicator

6.5.2. Adjudicator's decision

6.5.2.1. Pay agreed price escalation and interest up to 31 July x+4 the date of award

6.5.2.2. The amount to be paid including interest is 161,900.00 LKR

6.6. Dispute 6. Release of retention money

6.6.1. The adjudicator's reasoning

6.6.1.1. The respondent agreed to release the second part of retention as per sub clause 48.2 amounting to 1,087,000.00 LKR. The rate of interest has to be as per contract clause during initial contract period

6.6.1.2. After the contract period any agreed condition by the parties may be amended on agreement as done for the construction period. Price escalation is allowed in contract as value of money changes with time. So, the interest rate too can be changed

6.6.1.3. In general **practice the courts order legal interest to be applied for payments ordered lately for old events**

6.6.2. Adjudicator's decision

6.6.2.1. Pay the agreed amount

6.6.2.2. The amount to be paid including interest is 1,087,000.00 LKR

6.7. Dispute 7 Additional overheads incurred as a result of extension given

6.7.1. Adjudicator's reasoning

- 6.7.1.1. During the hearing respondent agreed to pay additional Costs. The word 'Cost' is emphasized in clause 40.5 [7.1 of proceedings]
- 6.7.1.2. The respondent's stand that the actual Cost can be compensated as per sub clauses 44.2 and 44.3 is upheld
- 6.7.1.3. Regarding the period for such calculation the same reasoning used by the adjudicator in dispute 5 is applicable here too i. e. 31/10/x+2. [Refer PD's letter 01-18 dated 12/10/x+2]
- 6.7.1.4. The claimant should submit the audited statements available for the financial years during the contract period for evaluation. If not, he will lose his right for a claim
- 6.7.1.5. The overhead and profit are covered in contract item rates and preliminaries. The head office overhead is generally distributed to different projects by the contractor on his own; and it is in item cost as OH & P factor only. Hence when extended periods are involved the HO component of overhead ONLY, has to be paid
- 6.7.1.6. As these details are not obtained at the beginning of the contract and figures now assumed by the respondent or given by the claimant cannot be contemporary records during the full project period.
- 6.7.1.7. The respondent's request for audited statements was not disagreed by the claimant and the adjudicator too agreed for submission if the claimant has no objection to submit
- 6.7.1.8. The claimant has submitted 02 audited statements for x/x+1, x+1/x+2. vide letter dated 22/06/x+4
- 6.7.1.9. The overhead Cost relevant to this project in the extended period is not easy to be evaluated from the audited statements, because the Cost is defined in the contract under clause and Clause 44.2 defines payment of additional Cost
- 6.7.1.10. The possible method is finding the head office overhead factor as a percentage of the total income
- 6.7.1.11. Find the amount paid to the contractor during the extended period. Multiply this value by the percentage and find an approximate HO overhead Cost relevant to this project

6.7.2. Adjudicator's decision

- 6.7.2.1. **The adjudicator calculated to pay with interest at legal rate**
- 6.7.2.2. The amount to be paid including interest is 1,355,850.00 LKR

6.8. Dispute 8 Refusal to make payments under preliminaries

6.8.1. Adjudicator's reasoning

6.8.1.1. The respondent in his further clarification letter dated 25/07/x+4 states that the preliminaries for 9 months after for the extended period has been paid in SAC. Time based payments for some preliminaries are allowed to cover contractor's overhead- site component especially, as the Employer considers suitable. The bidder was allowed to price these.

6.8.1.2. **If the Employer considers allowing time extension is reasonable, payment of these time-based preliminaries is also reasonable, when EOT is approved conditionally or not.**

6.8.1.3. Therefore, the contractor is eligible to be paid for preliminaries which are time based, namely –

6.8.1.3.1. B1 & B2 – cost of extension + overhead only

6.8.1.3.2. B3 - maintenance component for the additional period, the Engineer occupied it

6.8.1.3.3. B4&B5 - maintenance component for the additional period used only

6.8.1.3.4. B6 – Additional period the required staff was engaged

6.8.1.3.5. B9, B11, B13B14 B15, B16 & B17 proportionately for the additional period only

6.8.1.4. The staff engagement under B 6 has been sent by the respondent by email on 27 July/ x+4 the signed attendance of Mr. B and Ms. A and Mr. P. J. from October x to Jan x+2 as follows

6.8.1.5. **20/04/x+1 onwards is the extended period**

Year	month	Name(s)	Days [n]	Effective months [n/25days]
X+2	January	A	20	0.8
		P J.	20	0.8
X+1	December	A	11	0.44
			11	0.44
	November	P J.	23	0.92
			26	1.04
	October	A	25	1
			25	1
	September	P J.	23.5	0.94
			25	1

	August	A	24 24	0.96 0.96
	July	P J.	24 27	0.96 1.08
	June	A	23 23	0.92 0.92
	May	A	22 26	0.88 1,04
	April	P J.	23 23	Beyond contract period i. e. 20 th = 0.12 each
<p>Notes:</p> <ol style="list-style-type: none"> 1. Considering 05 public holidays and 30 days average per month Minimum Number of days of work to be qualified for monthly payment is 25 days 2. Claimant states under dispute 8, “preliminaries were honored during the initial extended period but some items were curtailed unilaterally”. So, the period beyond initial contract period is only considered here. 3. Engineer months = 7.94; TO months = 8.4 4. Rate Employer given– Engineer 62,500/= TO 25,000/=. Thus, the ratio is 5:2 5. Proportionate amount per month = 450,000/8 months = 56,250.00 6. Payable rate Engineer 40,178.57/=; TO 16,071.43/= 				

6.8.2. The adjudicator’s decision

6.8.2.1. The difference of the dues as explained less what has been already paid, shall be paid with interest

6.8.2.2. The amount to be paid including interest is 715,000.00 LKR less 9 months paid in SAC after checking from Respondent as per the e- letter received on 04/08/x+4

6.9. **Dispute 9 Payment for the security arrangement made after the completion of the project die to some delay in the taking over by the Hospital authorities**

6.9.1. The background

- This is an additional one proposed and agreed by the parties to be taken up in this adjudication
- Parties agreed for the event and the period involved
- The issue was rate agreement
- The rate recommended by the Engineer had been amended by the Provincial Director as per the department practice that the rate for watcher is different from that of a labourer
- The adjudicator suggested the parties to agree and settle on this basis and *parties agreed*
- *As per the PD's letter 03-04(18)* dated 10/09/x+3 matter will be settled except 14% OH&P factor to be changed to 26%. The due date is 14/05/x+3
- Thus, the agreed rate for watchers will be $1400 \times 1.26 = 1764.00$ for 106 days will amount to 186,984.00 LKR

6.9.2. Adjudicator's decision

6.9.2.1. The value on the above basis which is 186,984.00 LKR and interest for the delayed period in the same basis as calculated for others.

6.9.2.2. The amount to be paid including interest is **208,000.00** LKR

Interest calculations for the amounts changed as per the Adjudication decision shall be done as follows

- All corrected payments should be compensated using agreed interest rate i.e., the relevant lending rate in the CBSL publication same as the one given in annexure 1.1 in SOC; the values in fourth column + 1% as per the sub clause 43.1.
- IF THE DUE DATE FALLS AFTER THE ORIGINAL CONTRACT PERIOD THE RELEVANT LEGAL INTERST RATE SHALL BE SLECTED [these are, 11.5% 11.64 %, 10.12% and 7.48% for the full year respectively are given in separate gazettes each year]
- The event date shall be the date of the IPC received by the Employer where the rate is corrected and the pay date shall be the date of the determination of the adjudicator to calculate the interest payable period.
- As per contract, interim payments are to be made monthly; HENCE interest amounts shall be calculated for each month and added to the sum due for interest calculation for the next month. However, if the bill submissions are later than 1 month the extra delay need not be considered for the interest calculation interval. But the interest rate shall be the one prevailing on the date of receipt + 35 days, i. e. the payment is due to be made as per the contract.

Summary

No	Dispute	Decision of adjudicator
	Interest should be paid for all corrected payments to be made as a result of the adjudication decision. The interest rate shall be the lending rate by the Central bank +1% as per the contract clause for all delay periods up to the end of original contract period. Thereafter, for all dues interest shall be calculated at legal interest rates in GOSL gazette for each year	
1	Liquidated damages were imposed and released without compensation	Pay LKR 0.003, million as claimed & agreed by the parties
2	Interim bills were honored very lately causing financial losses	Pay LKR 0.618, million as claimed & agreed by the parties
3	Refusal to accept our Overhead & Profit component in our estimate	All work instructed or having effect of commencing after the initial contract period, the rates should be the amended rates as listed below. The profit and overhead factor shall be 26% disregarding 14% limit and district price committee rate condition
4	All our variations are to be considered as compensation events and payments shall be made accordingly	The Engineer amended rates shall be corrected for those commenced after or the instruction given for different work, after initial contract period even for which new rates are already agreed. The amendment shall be using average of contractor quoted rates and district price committee and day works rates selected by the Engineer to arrive at the basic cost Use the OH & P factor as 26 % as directed by the Adjudicator. The amount to be paid including interest is 0.746million LKR
5	Price escalation during the extended period	Pay price escalation has been offered in SOD and the claimant accepted it in Reply to SOD Pay interest for the agreed amount as given in the cage above. The amount to be paid including interest is 0.161million LKR

6	Release of retention money	Pay the agreed amount with interest as explained in the cage at the start The amount to be paid including interest is 1.087million.LKR
7	Additional overheads incurred as a result of extension given	The respondent agreed in proceedings that Cost can be paid and the actual cost is not available and it has been assessed using the audit reports of the company. ONLY THE HEAD OFFICE OVERHEAD AND FINANCIAL CHARGES AS A PERCENTAGE FOUND AND THE SAME BASIS IS USED TO FIND THE OVERHEAD FOR THE AMOUNT PAID IN EXTENDED PERIOD The amount to be paid including interest is 1.355million LKR
8	Refusal to make payments under preliminaries	The difference of the dues as explained less what has been paid, shall be paid with interest The Engineer give additional 9 months payment made in SAC vide e- letter dated 4/08/2022 The amount due is 0.205 million
9	Payment for the security arrangement made after the completion of the project	Pay the PD proposed rate with interest for the delay The amount to be paid including interest is 0.208million LKR
Total amount recommended		4.383 million LKR

6.9.2.3. The adjudicator in making this decision had considered the following

- 6.9.2.3.1. The fairness principle from procurement stage regarding the deficiencies in fixing conditions for new rates in a competitive bidding contract. Yet adhered to agreed conditions regarding matters arisen during the initial construction period
- 6.9.2.3.2. The non-systematic approach in, contract administration by the Engineer, contract management approach of the contractor, accepting their agreed practice as normal as far as practically possible [e. g. adopting a construction program without a critical path in the activity time schedule]
- 6.9.2.3.3. Commencing almost all new items without agreeing new rates. Thereafter, the Engineer's determination considered as non- acceptable and not adhering to

time targets given for notices & claims or certification and payments of claims, creating dispute situations

7. Conclusion

- 7.1. **The claimant's dues as evaluated according to this adjudication decision shall be paid within 30 days of receiving the determination by the respondent**
- 7.2. **Any delay after the 30th day should be compensated with interest payment at the prevailing legal interest rate**

On the date of 31 July x+4 at 'A' and delivered later at 'B' as per clauses 24 & 25 of the construction contract signed by the parties.

Sole adjudicator

Lessons

1. Construction program should have activity time schedule showing the critical path and resources schedules with time periods. Otherwise, the progress cannot be assessed in comparison to agreed program. Then the contractor does what he wants and the Engineer tells what he thinks as right and the disagreements start from then.
2. Anything explicitly given in any part of a contract document cannot be disregarded by any party or DB. If not clearly stated or there is an ambiguity, the Engineer should interpret and if not acceptable, it can be referred to DB. He can interpret or give decisions on fairness and natural justice if and only if things are not clearly stated in the document. **Where the document is clear the DB cannot change but reason out and confirm only, unless violating 'unfair terms contracts' act**
3. A Claimant has no right for interest payment when he has not even mentioned of the cost needs [not an estimated value even] **but as per SBD documents the right is not lost as is in FIDIC conditions**. So, request has been allowed as a new claim at the time of adjudication without any interest payment. Reader may please compare the relevant clauses 19 and 20 in CIDA and FIDIC documents.
4. It should be noted payment of interest on delayed payment is a matter to be claimed in the next IPC and early warning is not needed because the clause says "it should be paid there is no mention of early warning requirement".
5. When the delay event has occurred after the approved EOT period and or before the taking over certificate due to no fault of the contractor even if the Engineer writes **EOT is allowed without cost as condition** the contractor's entitlement for **cost has to be allowed**. Such condition can be written if the Engineer/Employer wishes to save the contractor from LD for a delay caused by the contractor.
6. The best practice is for the Engineer to categorize delay events separately when concurrent delays occur. Then identify whether it is by the contractor, Employer or beyond the control of either party. If beyond the control of either party it may be

termed force majeure' though force majeure' is not defined in the contract document. Under such situation each party has to bear their share of cost and only time has to be allowed to the contractor. Assess the delay by marking on the activity time schedule, the activities affected during the time and assess the extension of the critical path and allow only that much as EOT. In the letter, extension given for each cause of delay should be mentioned, without just allowing a number of days. These will help evaluation of cost, when cost claims are made even later in a dispute situation,

- 7. Note should be made of ratio of the amount claimed [16 million approx.] and the amount allowed [4 million approx.]. Most claimants add as much claims as they can, whether the claim has a basis or a probability of being accepted as entitled.**

Post script

Parties have accepted the decision and settled accordingly

Chapter 2

The dispute:

The dispute consists of 09 referrals on various headings [they identified as separate disputes] but basically, on Extension of time, Variations, Payment errors, wrongly imposing delay damages, Interest payments, Profit and overhead for lost scope and Additional overheads for delayed period. The remedy sought and award are given in a table format at the beginning and the end of dispute analysis respectively.

The background:

The project is for construction of a school building. The contract document appears to be hurriedly prepared. Some Special Conditions included, in Contract Data, are very arbitrary, e.g., the profit and overhead percentage is fixed. Labor and material cost shall be, as in district buying committee rates, the technical staff to be engaged by the contractor paid under a preliminary item.

The contract conditions are ICTAD/SBD 1 and the specifications are ICTAD/ SCA VOLUMES for buildings, water supply and roads

Contract administration too is amusing. The program submitted, consisted of activity time schedule only. Resource schedule and method of construction are not asked for. The activity time schedule had not been revised, except at the time -extension for the first time. The contractor has ignored the Engineer's instructions many times.

Due to the corona and economic situation the price fluctuation payments were ineffective. The parties signed a memorandum of understanding [MOU] which has been based on the ministry circular to settle payments to the contractors, in such a way that neither party is at a disadvantage due to the abnormal market situation. However, the MOU drafted by the Employer is one sided. The contractor has written a foot note while signing, but it was not focused on what is critical, but some irrelevant imaginary phrases were included.

In this case there are some interesting things to read, the way they have worked and the way they have worked to fight the claim referring many documents, whereas they have not referred standard specifications and contract clauses while construction was on.

Admissions and issues:

Admissions and issues raised by the parties are not included in this as they are long lists and some are not logically submitted. Also, the relevant issues can be understood to a reader having any background knowledge of construction disputes, when Contractor/claimant's contention and the Employer /respondent's stand are carefully read

IN THE MATTER OF ADJUDICATION OF A DISPUTE

Between,

J E [Pvt.] LTD -

- **Claimant**

Represented by

Mr. W -

- Managing Director

Vs.

Director - **Respondent**

Represented by

Mr. P. -Engineer

Before:

Eng. X.

- Sole Adjudicator

In connection with a dispute on payment for

Contract – Construction of a school building

Remedy sought

The claimant referred disputes have been listed as given below for ease of reference

Dispute No	Description in brief	Amount claimed LKR
1	Approval for Extension of Time [EOT] for valid reasons submitted by the claimant and conditions applicable before MOU was signed with the Employer	Respondent to accept the EOT requested as per cl. 6
2	Reimbursement of loss incurred for materials due to price increase caused by the economic crisis beyond CIDA bulletin indices-based calculation	1.7 million
3	Approval of Engineer's Special Rate works which were not approved by the respondent	0.5 million
4	Claim for overhead cost as per Hudson formula for the period delayed by the respondent	0.6 million
5	Reimbursement cost for preliminaries and salary of the Technical Officer only for the delayed period caused by the respondent	Amount will be submitted after completion of the project as per MOU signed

6	Interest claim for the imposed Liquidated damages without valid reasons	0.07 million
7	Concrete blocks at site which are not approved	0.5million
8	Retention money to be released after handing over the project as there is no meaning to hold retention money after mutual termination	To be released
9	Loss of profit for omitted BOQ items in the original agreement	1.5million

Letters x, x+1 etc. denote the years of the project period from start to end

1. Events

- 1.1. Respondent proposed Eng. X. among others as adjudicator by letter dated 05/09/x+1
- 1.2. Claimant agreed selection of Eng. X. as adjudicator vide letter dated 13/09/x+1
- 1.3. Adjudicator informed his terms to accept the responsibility vide letter dated 20/09/x+1
- 1.4. Parties agreed for terms on letter dated 20/09/x+1
- 1.5. Preliminary meeting was agreed to be held in Department premises and was held as agreed on 03/10/x+1
- 1.6. **Tentative** time table was agreed for the submissions and first hearing and the dispute adjudication agreement was signed by the parties [later by the Director as he was out of the country]
- 1.7. Clarifications were sought by the adjudicator vide letter dated 23 January x+2
- 1.8. First hearing was done on 16 March x+2 using zoom technology through an arbitration center
- 1.9. Second hearing was done on 27 March x+2 using zoom technology through the arbitration center

2. The submissions

- 2.1. J E [Pvt.] Ltd- contractor submitted the statement of claim [SOC] for the remedy sought as above, dated 27/10/ x+1
- 2.2. Statement of defense [SOD] was submitted with cover letter dated 22/11/ x+1 by the respondent namely Eng. Mr. P - as the Employer's representative.
- 2.3. Reply to SOD was submitted dated 17/12/x+1 by the claimant [2 books No 5 and 4]
- 2.4. Rejoinder was submitted by the respondent dated 13/01/x+2
- 2.5. Clarifications were received from the parties, vide letter dated 31 January x+2 from the respondent and vide letter dated 10/January /x+2 by the claimant

- 2.6. Admissions and issues were agreed by the parties on 10 January x+2 and on 31 January x+2

3. Proceedings are not attached *[too lengthy]*

4. About the project

- 4.1. Value of contract: 25 million LKR
- 4.2. Date of commencement – 14/05/x
- 4.3. Revised date of commencement - 09/07/x
- 4.4. agreed date for completion before construction commenced- 17/02/x+1
- 4.5. Extended date of completion – 05/03/x+1
- 4.6. Rate of LD per day of delay 0.05% of contract sum
- 4.7. Maximum value of LD 10% of contract sum
- 4.8. MOU signed on – 22/08/x+1

5. Dispute analysis

5.1. Dispute 1. Approval of EOT before MOU was signed

5.1.1. The claimant submitted [SOC]

- 5.1.1.1. The site was handed over on 12/05/x. Revised layout plan was sent by registered post by letter dated 02/07/x claimant received on 04/07/x+1 by registered post. Teak trees cut by client on 08/07/x. Therefore, project start was on 09/07/x = 57 days delayed
- 5.1.1.2. Rainy days and public holidays including Sundays –120 days as it takes about 7 days after a rain to absorb surface water, as the land is low
- 5.1.1.3. De-silting work was done after rain
- 5.1.1.4. Construction of internal roads
- 5.1.1.5. On site transport, without proper access
- 5.1.1.6. Effect of corona pandemic, causing shortages in labor and material supply
- 5.1.1.7. Delay in advance payment –14 days
- 5.1.1.8. Non- availability of fuel and hence technical officers not at site
- 5.1.1.9. MOU was signed by the parties with acceptance to extend the time in accordance with cl. 1.6
- 5.1.1.10. From 12/06/x+1 until signing MOU no work was at site due to shortage of resources caused by the situation in the country
- 5.1.1.11. Therefore, the EOT request has to be allowed

From Reply to SOD

- 5.1.1.12. Photo copy of the revised plan was received by Claimant's technical officer on 30/06/x on her request by hand unofficially.
- 5.1.1.13. Approval for excavation by JCB machine was requested by letter 02/07/x.
- 5.1.1.14. Temporary setting out was done before clearing and grubbing; Respondent visited site and did not approve; dates for these are not given.
- 5.1.1.15. Contractor planned to use JCB for clearing grubbing and 2 teak tree removal. But tree removal was not given to the contractor. Therefore, when tree removal was done the JCB moved to site after tree removal on 08/07/x
- 5.1.1.16. There was no space within premises to unload materials, and to construct the temporary buildings for site office, stores, workshop and labor camps. Materials were unloaded at the gate outside the premises, until the footing concrete was complete. This was informed to respondent's representative and consent is given by log note dated 15/09/x.
- 5.1.1.17. Site office and stores were constructed in available space and other sheds were not constructed nor claimed in IPAs, under preliminaries.
- 5.1.1.18. Effects of rain fall delayed the execution of work below ground due to the earlier delay on starting work as explained above.
- 5.1.1.19. Due to ground condition and stagnant water soil bunds were formed to protect the foundation excavation until work is completed to ground level; Photos are given
- 5.1.1.20. Records of weekly situation is given in log book though a weekly situation report is not submitted; 05 log books are completed. Both parties have made log notes in these.
- 5.1.1.21. Revised program was submitted with the first EOT request
- 5.1.1.22. Rainy day records are now taken from meteorological dept. as requested in SOD. In this area rainwater percolation takes long time about 7 days. This is accepted in the meeting on 10/12/x
- 5.1.1.23. Problem of silt collection and removal is also recorded by both parties in log notes.
- 5.1.1.24. Internal access construction is a small work using 2 loads of gravel few hours of work by JCB and 6-ton roller. Two photos are submitted; log note dated 06/12/x too

5.1.2. The respondent submitted

- 5.1.2.1. Claimant has started works at site on 17/06/x+1. Preliminaries including site office were not started; Log notes on 07/07/x, 15/09/x, 23/09/x, 29/11/x and 07/12/x are proof

- 5.1.2.2. Revision of layout plan is an increase of 2 inches in rear side. The drawing was given by hand on 30/06/x+1 and the letter is dated 02/07/x; - 47 days for layout drawing and 10 days for mobilization had been allowed as EOT
- 5.1.2.3. Teak tree removal- This work has been informed by log note dated 07/07/x and the work was done on 8 /07/x. This has not affected claimant's work program. Hence not considered for EOT
- 5.1.2.4. Rainfall effect- This has not been pointed out by the contractor, showing his critical path of work program is affected. The contractor is supposed to submit weekly reports. Even after the Engineer has given the format, contractor failed to submit this report. This is against clause 32.2 of COC. As these records are not made weekly, the Engineer has asked for rainfall data from meteorology department but is not done by the contractor. As per Engineer's records 21 days are allowed for rain in EOT 1
- 5.1.2.5. Earth supports, de-silting, internal road construction internal transport for not having reasonable access-These were claimed in IPA 1 letter dated 03/11/x for the first time. Early warning was not done. Contractor's log note on internal transport without proper access, was replied by the Engineer's representative on 07/12/x
- 5.1.2.6. Days affected by Covid-19 pandemic-- No work and slow progress had been noticed by the Engineer vide' letters dated 13/09/x and 28/12/x. As others in the industry are performing within limitations, the contractor had been informed that corona effect will not be considered.
- 5.1.2.7. Delay in advance payment- Amended advance guarantee bond was submitted on 27/07/x and payment date is on 19/08/x. The gap is 24 days. Thus, the delay is only 10 days with allowed 14 days for payment. This was informed by contractor's letter dated 30/07/x+1 and the Engineer wrote to justify the effect on work program vide letter dated 29/08/x+1. No reply is received yet.
- 5.1.2.8. Material shortage—contractor's letters dated 31/01/x+1 and 01/01/x+1 was replied by the Engineer vide' letters dated 08/02/x+1 and 25/01/x+1. Request for weekly progress reports indicating material stocks and the program and critical activities were never submitted and the contractor failed to cooperate as per clause 28.2. During this period there were organizations ready to supply to govt. projects
- 5.1.2.9. Non- availability of fuel for movement – The issue was not mentioned during the affected period. The contractor has not shown the effect on critical path activities and notice is not given
- 5.1.2.10. On MOU – A meeting was held between the parties on 22/08/x+1 and MOU was signed based on the National Budget Circular No. 03/x+1 dated 26/04/x+1. Regarding extension of time nothing is stated in MOU.

5.1.2.11. The respondent accepts that there was no work at site during the period. But the reasons are not accepted

From rejoinder

5.1.2.12. The respondent did not accept claimant's conditions. If so, these would have been included in the MOU

5.1.2.13. It has been explained through the respondent's letter dated 18/10/x+1

5.1.2.14. Teak tree is not a problem for setting out. But the second tree was removed considering future and the date is 08/07/x. During this time the contractor did not mobilize

5.1.2.15. Therefore, 47 days for delay in layout drawing and 19 days for remobilization have been approved

5.1.2.16. School premises have enough space for stockpiling and temporary buildings. The photos are given. Respondent seeks the adjudicator to visit the site for confirmation

5.1.2.17. Log note dated 15/09/x requires to complete site office before footing concrete. The Engineer has not consented to do the footing before the site office

5.1.2.18. After many log-notes the claimant made 01 site office and took over two adjacent buildings from the client to use as stores; log notes and photos in annexure 4 to 9 confirm this. SO THE CLAIMANT IS MISREPRESENTING INFORMATION

5.1.2.19. Layout drawing teak trees and site space matters are repeated and the respondent has replied these in SOD in many places

5.1.2.20. 120 days of rain fall is not experienced in Jaffna district. Photos are taken in peak period of rain and they are not supported with dates

5.1.2.21. The Engineer did not instruct additional works as they are not necessary. Whatever additionally done is not really needed

5.1.2.22. Log notes were not providing all what was expected in weekly report

5.1.2.23. 120-day extension request, should be validated with critical path in the agreed construction program

5.1.2.24. Rain fall data is taken from very far away place from K; Data from A is closer and the Engineer's representative has shown in SOD.

5.1.2.25. Since weekly reports are not submitted the rainfall data had to be called.

5.1.2.26. Claimant's letter has been replied though it is not mentioned in the minutes of the meeting on 10/12/x.

5.1.2.27. Claimant failed to extend the advance payment guarantee neglecting his responsibility and requested to deduct from his payment

5.1.2.28. Fuel crisis started after the approved EOT [05/03/x+1]

- 5.1.2.29. MOU was signed purely based on National Budget Circular in the LD period.
- 5.1.2.30. Target date was fixed to complete the reduced scope only. If not, after the maximum LD period the contract would have been terminated. LD deduction is not a result of MOU
- 5.1.2.31. The circular mentioned that attention should be paid to a method, by which a consensus is reached and no disadvantage happens to the government and the contractor
- 5.1.2.32. If the progress was good, scope reduction is not necessary
- 5.1.2.33. Claimant cannot be given EOT after 05/03/x+1

5.1.3. Adjudicator's reasoning

- 5.1.3.1. The claimant's reasons for Extension of time [EOT] are
 - i. Not getting the layout drawing
 - ii. Disturbance caused by a teak tree removal of which was not given to the contractor
 - iii. Effect of rain for foundation work and
 - iv. The Covid-19 effect and economic situation of the country affecting market stability and shortage of materials. These are fair and reasonable requests
- 5.1.3.2. However, rain is not a compensation event under sub clause 44.1; but unforeseen ground condition is a compensation event. It has been established that the rain had a bad effect on site for foundation works and the **Engineer has allowed 21 days for effect of rain.**
- 5.1.3.3. Thus, rain has been an accepted reason for EOT for this contract. But the 21 days allowed had been based on log book record only. The rainfall had not been measured at the site; EOT had not been justified as a quantity on any basis. But it had been allowed as a fair amount by judgment.
- 5.1.3.4. The claimant is not satisfied with this assessment. Photographs submitted showing the damaging effect is not with the date mark. The dates are recorded on normal photographs and it is believed by the respondent as selected affected days only are presented for a bigger period. The claimant stated the rainwater is absorbed in to the sub strata after about 7 days hence more time is required to commence work after rain.
- 5.1.3.5. The respondent pointed out the claimant / contractor did not follow contractual requirements in a) giving early notice, b) requesting /submitting the claim in stipulated time, c) showing the delay effect on the critical path.
- 5.1.3.6. In the hearing it was informed on adjudicator's questioning that **there is no critical path shown in the program by the contractor.** If so, asking for the effect of the

event on the critical path is meaningless. It shows that the contract had not been implemented as required in the contract document.

- 5.1.3.7. The respondent was stating that the weekly report was not submitted by the contractor as required. The format had been given, but the contractor has ignored submission. The reason for not following is given by the claimant in the proceedings that, the report had to be prepared by the contractor and signed by the site representative of the respondent and therefore, it was not possible to do it smoothly. Not a single report had been submitted and it shows that the interest was not there. Though the Engineer is reporting these in the submissions after writing 2 letters on the subject, the Engineer had not been hard on the contractor on non-cooperation. The **claimant / contractor had failed to follow contract clauses- 23 Instructions, 32 Early warning, 39 variations** and this could have been used to terminate the contract too if properly followed up by the Engineer.
- 5.1.3.8. THE ADJUDICATOR THEREFORE CONSIDERS THAT THIS CONTRACT HAD NOT BEEN IMPLEMENTED AS PER THE CONTRACT CONDITIONS AND STRICT ADHERENCE TO THE REQUIREMENT. NOW, IS NOT PRACTICAL AND FAIR AND REASONABLE WAYS OF RESOLVING HAS TO BE FOLLOWED.
- 5.1.3.9. Regarding the delay of the drawing, start date has been adjusted and hence the matter need not be reconsidered.
- 5.1.3.10. Regarding the effect of rain 21 days allowed is by judgment only. The claimant is not satisfied and says the delay is more. But there is no way of assessment though the delay is a fact. In civil contracts where the work is exposed to rain throughout the project period special conditions are written to consider rain as a compensation event and the rain fall at the nearest rain gauge station will be used to decide the effect of the rain. By this method rainfall recording at site is eliminated and as rain is a normal situation in the country UNUSUAL RAIN **ONLY is considered.** So, the rainfall values above 98 percentile-value of last 10-year rainfall value is considered. RDA adopts this method for many years
- 5.1.3.11. The adjudicator decided to adopt this method and obtained the nearest available rainfall from the second closest rain gauge station as it was reported from Meteorology Department that due to some problem daily rainfall records are not available at the nearest rain gauge station.
- 5.1.3.12. To make the evaluation easy and this being a 7 month project the adjudicator obtained 5-year rain- record from A, through the parties and to use the 98-percentile value. When the available readings in the population is below 100 the maximum value is considered as the 98 percentile values as given in statistics books.

- 5.1.3.13. The work had been started on 09 September x, as submitted by the parties. The claimant had stated in page 3 of SOC under item 11 that the contractor suspended work on 12 June x+1, until signing MOU i.e., on 22 August x+1. The maximum rainfall during the data available period, if exceeded within this “work period”, those exceeding days are considered as rain affected days PROVIDED that the rainfall figure is **above 10mm**, which is considered wet enough to affect work.
- 5.1.3.14. Accordingly, it was found 46 days as rain affected. When the already allowed 21 days are deducted, **a maximum of 25 days can be allowed as rain affected days.**
- 5.1.3.15. Regarding the effect of Covid-19 and the economic situations causing an imbalance in market situation has to be considered. But **the effect of this on a particular project in a particular period cannot be assessed by ANYONE IN THE WORLD.**
- 5.1.3.16. So, the contractor not informing in advance cannot be taken seriously because the situation changed within weeks or days. The consideration is reasonable but the contractor has no right to insist for a given number of days as he pleases.
- 5.1.3.17. Planning work in such turmoil situation is impossible. Thus, allowing extra time is good but is not quantifiable. In practical life, for whatever plan achieved 95%, is considered satisfactory. That means a 5% error is tolerable. **Considering this situation, the adjudicator decides to allow 5% of the work period as a maximum compensation i.e., from 9/9/x, to 12/06/x+1 x 5% = 276 x 5%= 14 days approximately**

5.1.4. Adjudicator’s decision

- 5.1.4.1. Allow 25 days for the effect of rain and 14 days for the unusual and unbalanced market situation over and above what has been already allowed by the Engineer/respondent
- 5.1.4.2. Already deducted LD for this period should be repaid, but without any interest as the claimant has not followed the contractual requirement for an entitlement and these are compassionate considerations only, due to situations beyond the control of both parties.

5.2. Dispute 2 – Reimbursement of increased loss for material cost.

5.2.1. The claimant submitted

- 5.2.1.1. Concrete aggregate [3/4 metal] price is much higher in open market compared to the price obtained from the increased value using CIDA price fluctuation formula

- 5.2.1.2. As per contract conditions there is no clause to obtain this difference. This is due to Covid-19 and the economic crisis of the country. If the respondent accepted this situation early, the contractor could have been relieved of the responsibility or new rates could have been agreed. Respondent stressed to continue construction.
- 5.2.1.3. The contractor agreed to sign the MOU to complete the ground floor, so that the school will have a building for a few class rooms, at the meeting held on 22/06/x+1. Thereafter 6 conditions were informed verbally. The 06 conditions and the material price to be paid based on invoice value are given in letter dated 14/10/x+1 by registered post.
- 5.2.1.4. Thereafter, MOU was signed based on letter dated 05/07/x+1.
- 5.2.1.5. The price difference can be found from the base price from the district price fixing committee rates and the actual price can be taken from the invoice.
- 5.2.1.6. Price escalation was calculated based on the directive published on 30/11/x+1 by CIDA. This has to be done in two categories normal condition and abnormal condition.
Metal [aggregate] sand, gravel, cement and steel are under abnormal category for Northern Province. Other items are normal condition, as per agreement.
Therefore, condition No 4 of CIDA document proposed by the claimant is the important evidence for this dispute.
- 5.2.1.7. Therefore, the claim is 1.7million
From reply to SOD
- 5.2.1.8. CIDA 'bulletin indices' are not satisfactory for abnormal price changes prevailing. For sand and gravel transport permit from different locations was a major reason for these differences in prices.
- 5.2.1.9. Sand, metal [aggregate], gravel, cement and steel are the abnormal priced items
- 5.2.1.10. In this abnormal situation monthly bills [IPA] submission is not practical without sufficient work done
- 5.2.1.11. The detailed final calculation on price escalation for the work done up to the MOU signing, is attached with total current valuation and relevant material input percentages to show the loss incurred
- 5.2.1.12. There was no condition arisen to declare the Force majeure' condition through Government Gazette. The relevant 3 tests in connection with force majeure' condition is sufficient to conclude this issue --- clarification given for 3 tests and reference
- 5.2.1.13. MOU signing was pushed on the claimant; otherwise, performance guarantee will be en-cashed. Claimant has included in the MOU by hand writing "the above works have to be agreed to implement on the request made by Employer for

urgent requirement”. The continuation of work is a requirement of the Employer only. Claimant reminded the six conditions in the letter dated 05/07/x+1

- 5.2.1.14. CIDA has agreed to provide relief for the selective items in the abnormal conditions through a directive dated 30/11/x “*CIDA hereby directs the Engineer to the contract of ICW to abide by the conditions of contract and use fairness, justification and discretion to provide an appropriate decision with regard to the abnormal market reflections. It is also advised that the Engineer shall request actual billing [invoice] submissions from the contractors when making such determinations. This directive is valid w. e. f from 1/03/x-1 until a further directive/circular is issued by CIDA to the effect that this directive is not applicable*”

5.2.2. The respondent submitted

- 5.2.2.1. The respondent denies the claimant’s statement
- 5.2.2.2. CIDA price indices are published every month. If the interim payment applications are submitted every month the price change will be included. As per sub clause 42.1 the contractor shall submit monthly claims
- 5.2.2.3. CIDA method is for the whole project though paid monthly. At the end of the project there will not be much of a difference if the method is followed as in the contract and CIDA method has been prepared for that.
- 5.2.2.4. Weightings on inputs will be changed, if there is a change in the contract after completion. Contract clause 47.1 provides for it. As the contract work has been reduced as per MOU, this calculation will be done and already the Engineer has been instructed to prepare it.
- 5.2.2.5. The respondent expects to submit this new input percentages in due course.
- 5.2.2.6. Force majeure’ condition has to be declared by government gazette. We cannot do it.
- 5.2.2.7. MOU was signed purely based on National budget circular No.03/x+1 dated 26/04/x+1. Purpose of MOU is not to relieve any party of their obligations under the contract. It was not a matter in discussions before signing the MOU.
- 5.2.2.8. CIDA directive dated 30/11/x is not a circular or a gazette; it is only a directive. State ministry for Rural Housing and Construction..... has issued a circular dated 30/12/x through letter No.4/1/1/501 Vol. XIII, regarding this matter.
- 5.2.2.9. The above letter states “... to compensate the amount of price variation, to the contractors so as not to exceed 20% of contract value using the price variation formula of CIDA (for more than 3-month contracts) “.... No contract parties can seek undue benefits from this relief and they are bound to fulfill their contractual obligations in accordance with the provisions set out in the contract documents”

5.2.2.10. Therefore, the respondent has to act as per government circulars / rules and regulations

5.2.2.11. Therefore, the respondent will adhere to CIDA formula and the contract conditions

From rejoinder

5.2.2.12. This contract does not contain a force Majeure' clause. The claimant should quote requisite statute /regulation to confirm force majeure'

5.2.2.13. Bids were called after Covid-19 situation. So, the contractor was aware of the needs to take precautions. So, claimant is bargaining on a known situation as force majeure' situation.

5.2.3. Adjudicator's reasoning

5.2.3.1. As the claimant has very correctly explained the price difference created by turbulent market situation and price manipulation by the traders, shortage and hoarding of materials, cannot be compensated, because ICTAD price escalation calculation formula does not contribute a **fair compensation now**, as it had been for the past many years in use.

5.2.3.2. The price factor and the market situation in years x and x+1 need not be proven by the claimant or any notice be given as per contract because, it is not possible to give specific details as the situation was always changing by week, by day.

5.2.3.3. It is a known fact in the country and hence CIDA has issued a directive vide their letter dated 30/11/x, summarized under 5.2.1.13 elaborated by the claimant in SOC

5.2.3.4. Though CIDA has directed to reimburse some selected items on invoice values produced by the contractors, it is wrong by principle. As well, the invoice price for the same item in the same area during the same date, may be different from contractor to contractor, depending on their selected source or even from the same source of supply, due to their business relationships.

5.2.3.5. Also, it is known to those who have experience in the construction industry that, if it is not from large business organizations, an invoice **depicting required price can be obtained**. People of Sri Lanka are capable of printing bogus invoice books too.

5.2.3.6. Therefore, ICTAD price escalation formula should be used as normal and extra compensation should be made for the 5 items requested by the claimant but using a different basis, **not based** on contractor's invoice value

5.2.3.7. It should **be emphasized here that ICTAD price adjustment formula is not a method for reimbursement. It is only a compensation for price fluctuation situations in the market to be adopted for contracts, which are of longer periods**

than a month. By adopting 90% for input percentages itself, it is established that the price formula is to be used as an approximate compensation

- 5.2.3.8. Also, it should be stated that the price adjustment formula is based on monthly payment value and payments are made for work items and not for individual materials. Thus, under normal circumstances even the compensation for work item, covers changes based on more than one construction input. For example, for concrete price multiplied by the relevant indices in the price formula, cement, aggregate, sand, labor, fuel etc. are involved. Depending on the way the index table is prepared as given in the contract, the contribution for each material or labor component varies. Thus, this is only AN APPROXIMATION
- 5.2.3.9. Therefore, if an approximate compensation can be found, it should be satisfactory to get over the problem caused by the current turbulent situation, which makes the formula and indices unrealistic, compared to use of it in normal situations for years in the past.
- 5.2.3.10. The adjudicator did some trial calculations using ICTAD indices given in the price bulletin and the half yearly rates approved by the price committee making some assumptions to find a way of compensating the uncovered part of turbulent price change prevailing for the referred materials, to an approximate extent
- 5.2.3.11. This calculation is done for ONE invoice for each item except Cement, as half yearly rates for cement in price committee list, it is stated as the MARKET RATE. The adjudicator found the discrepancy is small and tolerable for steel and cement as they are from organizations of some reputation. But with the local supplier these are very much fluctuating
- 5.2.3.12. The adjudicator assumed the price of an item at any time, if converted using price index at that time and the required time that values obtained is close to the actual market values. But it was not so for aggregate and sand but satisfactory for steel for the sample values used for calculation.
- 5.2.3.13. **Based on this single sample calculation the adjudicator concluded**
- No correction need be made for cement as market price is the rate selected by the price committee
 - The steel price is close to the calculated price and very slightly high. So, 90% of such calculated value has to be paid to the contractor **and STEEL work should not be used in normal price escalation calculation for value of work done for the bill [IPA] period**
 - For aggregate and sand, even the approximate price is not close enough the invoice price to consider as compensated. In this situation the adjudicator found 90% of this calculated current value + normal price increase found using

index value in March x and the relevant invoice date rate comes closer or just above the invoice price.

- d. Same shall be applied for gravel price too. Adjudicator did not calculate this as there is only one invoice which the parties can calculate

5.2.4. Adjudicator's decision

5.2.4.1. The claimant has to accept the price formula compensation for cement and there shall not be a separate compensation

5.2.4.2. R/f steel has to be compensated by calculating the new price based on price committee rates for the selected invoice time [month] using ICTAD indices to work the proportionate increase. 90% of this CALCULATED new price is to be allowed and steel work value shall not be used in normal price escalation formula application in monthly IPC

5.2.4.3. For sand and aggregate also the current price shall be derived from price committee rate for the half year and converted to the relevant month. A percentage [%] of this value shall be paid IN ADDITION TO THE PRICE FORMULA PAYMENT.

5.2.4.4. The adjusted value to be paid additionally is calculated as follows

- i. Obtain **the March month of year x** [= starting month] approximate price by using average indices values in the bulletin for the first 6 months of year x. Multiply the price committee value by the index value for March and divide by the average index value
- ii. similarly find the approximate rate for the **month of purchase** in the same manner using rate for the 6-month period and index values during those 6 months and take the 90%
- iii. add the values calculated in i) and ii) above
- iv. If the sum is below the contractor's invoice rate PAY THIS 90% value calculated in ii) above as an additional amount and there shall be no change to the price formula calculation
- v. If the value calculated in iii) above is more than the contractor's invoice rate, Take 75% of the Value calculated in ii) above in place of 90%
- vi. Even if the value selected is above the contractor's invoice rate, ADOPT 75% AS ADDITIONAL PAYMENT because there are so many invoiced items the contractor has to forego as approximations.

5.2.4.5. Slight over payment for one item for one purchase need not be a problem, as price escalation payment is considered as a whole for the project

5.2.4.6. Above 5.2.4.3 and 5.2.4.4. are NOT A DUPLICATION OF PAYMENT because it is a correction of the price escalation formula application to make the value realistic,

due to the turbulent market situation is different at different places without a pattern unlike a few years ago.

5.3. Dispute 3 - Approval of ESR works which were not approved by the respondent

5.3.1. The claimant submitted

- 5.3.1.1. **ESR 1 and ESR 3** [earth support shoring on excavation area for rubble masonry and 150 mm wall foundation screed concrete]
- 5.3.1.2. Building location is in low ground; contractor was pressurized to commence work during rainy period; school premises was covered by a boundary wall; road level around the school was very high; So, earth shoring had to be done
- 5.3.1.3. This expenditure was claimed in next bill [IPA] with similar BOQ rate as per D23. The amount was not paid and evidence was requested which was given by letter dated 20/10/x+1
- 5.3.1.4. Evidence is – photos, log note dated 08/12/x+1 in log book No2 page 10; witnesses are both technical officers of Contractor and Employer
- 5.3.1.5. ESR 2 [De-silting (800mm) before screed concrete due to rain fall effect]
- 5.3.1.6. Excavated area was damaged by rainfall again and again. This has been cleared and rectified. When the additional expenditure was claimed the respondent deleted the amount and asked for evidence
- 5.3.1.7. Evidence had been sent by letter date 20/10/x+1
- 5.3.1.8. Other evidence - log notes dated 03/08/x page 318; 10/09/x page 319; 11/09/x
- 5.3.1.9. ESR 4 [construction of internal road]
- 5.3.1.10. There was no internal road for transport of materials by tipper; after rains it was not possible for tipper movement. So internal access was made by the claimant
- 5.3.1.11. This additional cost was claimed but not paid and asked for evidence
- 5.3.1.12. Letter dated 20/10/x+1 has been sent and photos are given
- 5.3.1.13. ESR5 [Internal material transport]
- 5.3.1.14. Due to lack of space gravel was unloaded at the gate and along the main road; About 25 tipper loads. Thereafter only arrangement was made, gravel was brought to play ground area using additional transport; 6 -8-ton roller was used
- 5.3.1.15. The claim was added in the bill and amount was deleted and evidence was requested
- 5.3.1.16. Evidence was given in letter dated 20/10/x+1; other evidence – log note dated 06/12/x
- 5.3.1.17. ESR 7 [Water tank construction for curing purpose of cement blocks cast at site]
- 5.3.1.18. The contractor planned to buy from suppliers and proved by test certificates for quality

- 5.3.1.19. But due to the situation in the country block yards had been closed
- 5.3.1.20. So, it was decided to cast them at site
- 5.3.1.21. Respondent pushed for full immersion of blocks for curing for at least for one day and continue stack curing
- 5.3.1.22. Therefore, the tank was constructed and the cost was claimed
- 5.3.1.23. The claim was rejected and evidence was asked
- 5.3.1.24. Evidence was given by letter dated 20/10/x+1; the tank is available at site

From Reply to SOD

- 5.3.1.25. Statement that this is a faulty claim by respondent is regretted, as evidence had been given with photos and it is a fact that earth supports were used to protect excavations from stagnant water. We had no option other than this to get progress in stagnant water conditions.
- 5.3.1.26. Physical evidence can be from our staff and from the respondent's side the technical officer who was at site
- 5.3.1.27. Documentary evidence is log note dated 08/12/x; Photos are given
- 5.3.1.28. Provision of earth support is seen by the outside finish of the rubble masonry
- 5.3.1.29. Log note of claimant's T.O. shows clearly de-silting was going on and the damage by rain. Respondent's T.O., did not deny this. BUT he stated that incomplete excavation was there.
- 5.3.1.30. What actually happened is, two work groups were at site. Team A completed shaping the sides of JCB excavations but team B could do only about 70% before the rains.
- 5.3.1.31. Log notes dated 17/07/x by claimant representative and log note dated 19/07/x by respondent representative at site. The claimant has claimed under ESR 2 is only for work by team A, as given in log note dated 17 not 18 /07/x.
- 5.3.1.32. If incorrect, why was the log note for additional cost not refused immediately?
- 5.3.1.33. Regarding ESR 4 & 5 according to log note dated 16/12/x, the aggregates were unloaded and reloaded to be taken to a separate place, as the site access was not good enough to move in to the site.
- 5.3.1.34. Similarly, 25 loads of gravel were unloaded at the gate as the transport permit time limits have to be observed by the supplier. Then a 75 mm layer of gravel was compacted by 6-ton roller to make a pathway for tipper movements Photos are given.
- 5.3.1.35. It was not possible to give early warnings for these types of situations.
- 5.3.1.36. Regarding ESR 7, the contractor could not buy from outside, as the yards are closed due to abnormal condition in the market prices of construction materials.

So, the contractor had to make site production and hence construction of curing tank and transport of block stones is additional cost.

5.3.2. The respondent submitted

- 5.3.2.1. The site is not a low land as such; The catchment area is the site only and no outside flow is there
- 5.3.2.2. ESR 1 and 3 are denied as these were not done
- 5.3.2.3. Claimant submitted this claim with his letter dated 03/11/x; before this he did not mention or request approval for these
- 5.3.2.4. Early warning or variation requirements under clauses 32 or 39 are not followed
- 5.3.2.5. No evidence was submitted, when the Engineer asked for it by letter dated 28/12/x
- 5.3.2.6. ESR 2 is denied by the respondent
- 5.3.2.7. Reply log notes are given by the Engineer's representative on the same dates; Only the incomplete excavations were done and excavated pits using JCB machine
- 5.3.2.8. ESR 4 & 5 were not done
- 5.3.2.9. No early warning was done by the claimant /contractor
- 5.3.2.10. Reply log notes were given on 07/12/x
- 5.3.2.11. ESR 7 [Water tank construction for curing concrete blocks]. The contractor should have assessed the market conditions and decided the methods of providing the blocks
- 5.3.2.12. If outside sourcing was planned, claimant could have stocked the item at the beginning
- 5.3.2.13. Casting started on 30/08/x+1. About 17 months are wasted before starting casting
- 5.3.2.14. Contractor or whoever has to follow CIDA specifications
- 5.3.2.15. The claim is denied

From rejoinder

- 5.3.2.16. Water collection in excavated pit happens anywhere and it can be emptied
- 5.3.2.17. As per Engineer's Representative [ER]'s log-note of 07/12/x there was no rain after 26/11/x
- 5.3.2.18. The contractor has not stockpiled materials and after 17 months only he is casting cement blocks
- 5.3.2.19. Specifications require 7 days immersion and 7 days sprinkling. So, construction of a water tank is not a compulsion by the Engineer

5.3.3. The adjudicators reasoning

- 5.3.3.1. New rates can be for extra works and variations only
- 5.3.3.2. As per contract clause 39.1 a variation or extra work has to be instructed by the Engineer

- 5.3.3.3. As per sub clause 39.4 “Each variation may include (a) changes to the quantities of any item of work included in the contract [However such changes may not necessarily arise from a written order]
- 5.3.3.4. Therefore, all the 7 ESR items which are not instructed cannot be considered as variations ordered by the Engineer. The contractor cannot start varied works on his own and force the Engineer to issue instructions
- 5.3.3.5. Formwork for screed concrete is a need. It has **not been included** under BOQ. The contractor should have given an early warning and requested for instruction before proceeding with the work.
- 5.3.3.6. Early warning is a must situation as it states “The contractor shall warn the Engineer.....” But the clause does not state if early warning is not given, any reasonable request will be denied totally and no payment will be done. So, the Engineer may allow reasonable requests. But the contractor has no right for interest claims on such events”
- 5.3.3.7. BUT IT SHOULD BE NOTED THAT UNDER CONCRETE there are notes in the BOQ and item d) states “unless otherwise specified in the respective items all formwork and reinforcement are measured separately”.
- 5.3.3.8. Screed concrete is BOQ item D1 and in the BOQ description nothing is mentioned of formwork.
- 5.3.3.9. Therefore, payment for formwork for screed is justifiable and it is similar to formwork for column footing and the same rate can be applied. This rate [item D22] is 1,101.60 per sq. m.
- 5.3.3.10. Early warning is said to be by log notes. Some of the log notes are replied by the site representative. When a variation is involved, it should not be left to the TO at site. They should be referred to the Engineer, the contractor should write letters on such matters; a letter in advance. Any urgent matter can be informed by telephone and then confirm the telephone conversation by letter. Due to this poor communication method, unwanted disputes are created. During the hearing the respondent pointed out their establishment of methods of communication, which the contractor has not followed. This is non- cooperation by the contractor. But the Engineer should have been hard on the contractor and got him to follow Engineer’s instruction failing which the contractor’s site representative had to be removed, if the Engineer requested so.
- 5.3.3.11. Contract clause 16 states” The contractor shall construct the Works in accordance with specifications and drawings and Engineer’s instructions. Accordingly, contractor [and Engineer] should have referred to the general specifications SCA/4 AND SCA4/II ICTAD publications of which chapter 2 covering site work, foundation excavation etc.

5.3.3.12. Relevant sentences/ clauses / phrases are quoted in short form

- 2.1.5 Waterways “*all field drains and waterways Shall be temporarily diverted”* If water ways are to be attended surface water dealing need not be emphasized
- 2.2 Excavations Note “The **contractor shall visit the site inspect** the trial holesand decide for himself the nature of the ground, sub soil to be excavated, and the ground water levels.....**does not absolve the contractor from his responsibilities**that similar conditions apply on other parts of the site” IF THE CONTRACTOR IS RESPONSIBLE FOR ASSESSING THE SITE CONDITION WHEN BORE HOLE REPORTS ARE GIVEN, **normal inspection requirement is totally the contractor’s responsibility**
- 2.2.5 Protection “*The contractor shall take adequate protective measures to see that the excavation operation does not affect or damage adjoining structures services etc.”*
- 2.2.6 Reinstatement of damages during excavations “*all materials, structures, foundations, surfaces, affected or damaged during excavation shall be made good by the contractor, at no extra cost to the Employer*” IN THIS CASE THE NATURAL EARTH MATERIAL AND THE ADJACENT SURFACE had been damaged due to wet condition during ‘the time the contractor selected for excavation’. [Note should be made that drawing matter was cleared and in 2nd week September excavation work was possible and it rained in late October only]
- 2.2.8 Stability of excavation – last Paragraph “*the contractor shall have full responsibility for the stability of excavation andIf any slip occurs the contractor shall remove all the slipped material, from the excavated pit without payment. If any damage to the built-up structure the contractor shall make good without any payment*”
- 2.2.9 Excavation for foundation last paragraph “*if the surface becomes unsuitable due to water or other causes, deteriorated surface shall be removed and replaced with concrete as directed by the officer –in-charge. The above shall be at the contractor’s expensepart of the contractor*”. THE RESPONSIBILITY OF DE-SILTING FALLS ON CONTRACTOR, AS HE HAS NOT DIVERTED WATER WAYS AWAY FROM EXCAVATED PITS AND BEEN LATE TO FINISH FOUNDATIONS WITHIN A MONTH OF A 7 MONTH CONTRACT TO CONSTRUCT A 2 STOREY BUILDING
- 2.2.11 Dewatering – entire section

5.3.3.13. **ESR 1** This is forming earth supports in place of working in dry weather or providing planking supports

ESR 2 De- silting which is contractor's responsibility as per specification

ESR 4 Construction of internal road and **ESR 5** Internal transport of material – Unless the Engineer has instructed or agreed, both are not payable as there is nowhere in the documents that site roads are available for internal transport. The contractor had made wrong assumptions or has not visited the site before submitting the bid.

ESR 7 Construction of curing tank- This is a specification requirement for casting cement concrete blocks. The contractor selected casting at site and the Employer cannot be made to pay for this.

5.3.4. **Adjudicator's decision**

5.3.4.1. Pay for the formwork for screed concrete at item D22 rate as the work is similar

5.3.4.2. No other ESR can be recommended as these are contractor's obligations as per specifications and the contractor should have allowed these costs as site overheads included in the price mark up on the basic cost of work items

5.3.4.3. There should not be any interest entitlement as the variation procedure given in the contract has not been followed

5.4. **Dispute 4 - Claim for overheads cost as per Hudson formula for period of project delayed by the respondent**

5.4.1. The claimant submitted

In SOC

5.4.1.1. Delays caused:

- i. by the respondent due to delay in revised lay out plan [02 months]
- ii. delay caused by rain as the project was fallen to rainy period due to respondent in late handing over of site [2.5 months]
- iii. Total delay by the risk of the respondent = 2+2.5 = 4.5 months
- iv. Other delays are risk of both parties

5.4.1.2. The overhead cost for the period of 4.5 months should be paid by the respondent according to Hudson formula

5.4.1.3. Basic cost = contract price – preliminaries, money provision, contingency sum and overheads

5.4.1.4. The basic cost is grand summary – preliminaries; i. e. 24,756,674.18 - 335,173.00 = 24,421,501.18

5.4.1.5. LKR 24,421,501.18 / 1.16 = 21,053,018.26 [16% overhead as in contract data]

5.4.1.6. Preliminaries as a percentage of basic cost = 335,173.00 / 21,053,018.26 = 1.592%

5.4.1.7. Therefore, site overhead is 16% - 1.592% = 14.408%

- 5.4.1.8. Overhead component excluding profit is $14.408 - 10 = 4.408\%$
- 5.4.1.9. Overhead cost = $21,053,018.26 \times 4.408\% = 928,017.04$
- 5.4.1.10. Original project period being 7 months the overhead cost per month = $928,017.04 / 7 = 132,573.86$
- 5.4.1.11. Therefore, the overhead cost for 4.5 month is $4.5 \times 132,573.86 = 596,572.37$ LKR

In reply to SOD

- 5.4.1.12. Overhead cost includes HO and site overheads. Part of site OH is covered in preliminaries. Therefore, input of preliminaries is deducted from the 6% overhead cost in this case and finalized the OH component as 4.408 %
- 5.4.1.13. Generally, 25% is allowed for overhead factor in a 35% profit and overhead factor in major contracts in CIDA publication and in standard method of measurements for building in SLS 573
- 5.4.1.14. In this contract, it is limited to 6% overhead out of 16% profit and overhead factor
- 5.4.1.15. HO overhead administrative cost only can be found from audited statements of a company. Therefore, it is not acceptable to find site and office overhead. Claimant accept office OH only in a very few cases and gave up costs at site level.
- 5.4.1.16. Claimant believes the Hudson formula covers both site and HO overhead. Hence the Hudson formula shall be used. The respondent proposed methods cannot be accepted

5.4.2. The respondent submitted

- 5.4.2.1. The respondent disagrees with the use of Hudson formula which is not agreed in the contract document
- 5.4.2.2. The claimant proposed 4.408% general overhead factor is acceptable to the respondent
- 5.4.2.3. The calculation basis is not accepted by the respondent on time basis
- 5.4.2.4. The respondent agrees to use the same factor for the value of work done beyond the original contract period. If not, to find the actual general overheads the contractor has to submit the yearly financial statements for the approved extension period
- 5.4.2.5. This claim was not submitted to the Engineer before the adjudication process and the Engineer should be given time to accept or determine

From rejoinder

- 5.4.2.6. The respondent denies use of Hudson formula on party autonomy

- 5.4.2.7. But has agreed for the 4.408% as a percentage of value of work done during the relevant period
- 5.4.2.8. The claim was not submitted to the Engineer to determine before the adjudication process. Thus, there cannot be a dispute unless the Engineer can consider the claim. Claimant is requested to submit to the Engineer

5.4.3. The adjudicator's reasoning

- 5.4.3.1. If EOT is considered fair and reasonable for any length of time, it is fair to allow cost of overheads for that period
- 5.4.3.2. But use of Hudson formula is not a condition agreed in the contract.
- 5.4.3.3. Hudson's formula had been accepted in some cases but there are cases where judges have refuted use of Hudson's formula because it has inherent errors of duplications of some factors in the derivation of the formula.
- 5.4.3.4. Hudson's formula had been accepted in some case laws and in some, the use and the basis itself had been rejected. The formula is not a universally accepted one as the 'Manning's formula' in hydraulics. So, the adjudicator is not in support for the use of this formula, when a proper construction company can show from the audited statements, a more accurate value for HO component of Overhead not covered in standard BOQ item costs due to extension
- 5.4.3.5. Further Society of Civil Law publication SCL Delays and disruptions protocol 2nd edition Feb. 2017 in GUIDANCE PART C – Other Financial Heads of Claim under 2.10 states "The use of Hudson's formula is not supported. This is because it is dependent on the adequacy or otherwise of the tender in question, and because the calculation is derived from a number which in itself contains an element of head office overhead and profit. So, there is double counting."
- 5.4.3.6. Though it is improper to fix the profit and overhead factor for a competitive bidding contract, the parties have agreed in contract data under sub clause 40.2, it had been agreed as 16% of basic cost as maximum profit and overhead factor. Therefore, it has to be followed.
- 5.4.3.7. In the overhead and profit factor the profit component is a bidder's choice. Overhead factor has two components a) site overhead b) fraction the bidder allows for the particular contract, out of his head office overhead cost as a percentage. The site overhead too involves two components. One component is time based and the other is quantity related. Most of the time-based items are given in the BOQ, by the Employer in the BOQ as preliminaries. Quantity related site overhead cost is generally added to the work item cost as a percentage; if the bidder feels some time-based items are omitted by the Employer, considering the construction

period the contractor should assess and add this cost too as an addition to the quantity-based site overhead factor.

5.4.3.8. The claimant has stated that the preliminaries are not adequate to cover site overheads. The respondent argued that a fair number of preliminary items are there to cover the cost. In examination of the preliminaries in the BOQ, it is observed the pricing is very unusual because, almost all preliminaries which are quite different, are priced at 459.00 LKR.

5.4.3.9. When BOQ is improper or bidder has not been careful in covering all his cost in the bid price, in his eagerness to win the tender the contractor becomes a loser. But this part of cost has to be borne by the contractor, as bidding for a contract is a voluntary act by the bidder

5.4.3.10. The calculation shown by the claimant and the respondent's comment too shows a 4.408 % payment as overhead component of main office. The claimant has to accept this or provide his actual Head Office [HO] cost per year and the allowed fraction for this contract, so that a time-based percentage can be calculated for the agreed extended period.

5.4.3.11. If the claimant is not prepared to divulge company audit statement or if he has no such document, the claimant has to be satisfied with the 4.408% basis for extra overhead calculation for the extended period

5.4.4. **Adjudicator's decision**

5.4.4.1. The use of Hudson's formula is rejected

5.4.4.2. If the contractor has no annual audited statement to find actual head office cost to apportion a part for this contract PAY the values of work done during the extended period by 4.408%, as the HO component of additional overheads

5.5. **Dispute 5 –Reimbursement cost for preliminaries and salary of the Technical Officer only for the period beyond the original contract period**

5.5.1. The claimant submitted

In SOC

5.5.1.1. please give time to submit this claim

From reply to SOD

5.5.1.2. The salary of the approved Technical Officer @ 45,000 per month, is claimed for the extended period and work implemented in MOU period

- 5.5.1.3. Site office and stores will be claimed at monthly basis, by calculating proportionately divided by 7 months to get the rate
- 5.5.1.4. Extended bank guarantee charges will be claimed as per bank commission reports

5.5.2. The respondent submitted

5.5.2.1. **The respondent admits for payment of preliminaries and the approved TO salary for the approved extension period**

- 5.5.2.2. Method of payment will be as described in the BOQ
- 5.5.2.3. The TO attendance should have been maintained and submitted monthly
- 5.5.2.4. Claimant should submit all the supporting documents, to validate his preliminary items during approved extended time
- 5.5.2.5. There are many incomplete preliminary items, for which the contractor's attention had been called by the Engineer's representative by log notes. All these should be considered when determining payment

From rejoinder

- 5.5.2.6. There is only 01 site office, which too did not have facility for site management staff. So, the Engineer denied payments
- 5.5.2.7. The claimant uses 02 numbers of stores, which are not constructed. So, the respondent refused payment
- 5.5.2.8. Payment for bank guarantee can be paid only for the extended period

5.5.3. **Adjudicator's reasoning**

- 5.5.3.1. As explained in the previous disputes, the time-based preliminaries should be paid for the approved EOT period
- 5.5.3.2. Regarding site office, a part payment [floor area can be the basis] can be decided by the Engineer to pay for the initial period they used it, off and on even
- 5.5.3.3. Technical officer's salary for the original contract period has to be at BOQ rate
- 5.5.3.4. The claimant's request to receive actual payment is justifiable, as agreed rates are only for the agreed period. But the claimant should provide documentary evidence which is not an internally produced one within the claimant's organization
- 5.5.3.5. The respondent's request of EPF ETF papers as evidence is correct
- 5.5.3.6. The claimant informed at the hearing that they do not have such documentary evidence
- 5.5.3.7. Therefore, the claimant has to accept the BOQ rate
- 5.5.3.8. The bank charges for the extended period have to be paid. This is not a matter to give early warnings under sub clause 32

5.5.4. Adjudicator's decision

- 5.5.4.1. Pay all time-based preliminaries to the new extended date as given in the adjudication decision
- 5.5.4.2. Pay for the site office proportionate to the floor area for the initial period used ONLY
- 5.5.4.3. Pay TO's salary at the rate in BOQ for the extended period
- 5.5.4.4. Pay bank charges for extension of bonds, based on the documents from the bank
- 5.5.4.5. No interest payment shall be done for these, as the claimant has not followed contract condition in giving information in time

5.6. Dispute 6 –Interest claim for imposed L D without valid reason

5.6.1. The claimant submitted

- 5.6.1.1. Imposed LD = 1,936,000.00 LKR. The period is from 25/06/x+1 to 27/10/x+1
- 5.6.1.2. Average interest rate from central bank lending rate at "bank rate" column +1%
- 5.6.1.3. The amount is 1,936,000.00 LKR x 21% x {n days /365} = 71,000.00 LKR
- 5.6.1.4. LKR 1,936,000.00 from 25/08/x+1 to 27/10/x+1@ 21% i.e., as taken from SLCB lending rate +1% as per contract on a monthly basis at compound interest. The interest claim was submitted on 25/08/x+1 for 71,000.00LKR
- 5.6.1.5. Respondent has agreed for EOT by clause 6.1, before MOU was signed. This was explained in letter dated 14/10/x+1

5.6.2. The respondent submitted

- 5.6.2.1. The claimant did not submit any document requested by the Engineer, to validate the extension of time requests
- 5.6.2.2. Since it is the contractor's fault, the respondent refuses to refund LD
- 5.6.2.3. Hence interest payment is not possible
From rejoinder
- 5.6.2.4. The respondent did not accept contractor's conditions before the MOU

5.6.3. Adjudicator's reasoning

- 5.6.3.1. Approved extension under dispute 1 by the adjudicator has to be allowed
- 5.6.3.2. Therefore, the LD deducted so far for this number of days should be released
- 5.6.3.3. There is not unreasonably deducted LD, as Engineer's determination is valid until adjudication decision is given
- 5.6.3.4. Any LD applied for the period after signing MOU should be reimbursed, because the MOU itself had been prepared incorrectly not meeting the aim of signing a MOU

- 5.6.3.5. Respondent states under dispute 2 that MOU was signed purely based on National Budget Circular [annexure J page 63 to 65] during the initial LD period, before the adjudicator allowed extension. The circular mentioned that attention should be paid to select a method by which, a consensus is reached and no disadvantage happens to the government and the contractor
- 5.6.3.6. If LD is imposed after signing the MOU, the purpose of “no disadvantage happens to the government OR the contractor” part is not achieved
- 5.6.3.7. Therefore, the imposing LD as per MOU which has removed only the clause 60 payment upon termination, is AGAINST THE INTENDED PURPOSE OF SIGNING MOU
- 5.6.3.8. Similarly, if the contractor makes a claim for additional payments for events after the MOU, it is also against the intended purpose of signing MOU
- 5.6.3.9. The claimant’s letter dated 05/07/ x+1, does not carry any weight as the claimant has signed the MOU without mentioning of it, whereas he has made a different foot note in the MOU
- 5.6.3.10. Thus, interest calculations should be for any wrong deductions made before the adjudication. What has been additionally allowed will be considered for interest payment, from the date of adjudication decision, to the date of payment only if later than the date given by the adjudicator

5.6.4. **Adjudicator’s decision**

- 5.6.4.1. During the hearing respondent has agreed to pay interest for LD deductions and price escalation amounts as per the contract
- 5.6.4.2. Parties should calculate these and payment shall be made referring to the adjudicator’s reasoning

5.7. **Dispute 7 – Cost of non- approved cement blocks cast at site due to alleged insufficient curing, caused by an internal conflict between the Technical Officer of the department and some site workers**

5.7.1. The claimant submitted

In SOC

- 5.7.1.1. Approximately 2300 Nos. of 125 mm thick blocks were cast using 1:4:5 mix ratio
- 5.7.1.2. The correct ratio was assured by the supervision of Technical Officer and two assistants.
- 5.7.1.3. The work was to be extended to 6 am to 7.30 pm but the TO of department did not allow it. Work was done from 8.30 to 5.30 pm only
- 5.7.1.4. Allowed curing process was: i) minimum immersed in water ii) First lot about 600 Nos. were not immersed as it rained 3 days iii) TO of the department wrote it was

only 2 days rain, which the claimant denied. iv) after the 3 days the blocks were cleaned and stacked as lot 1 v) the stack was wetted by pumping water at 1.5-hour intervals vi) later sprinkler was used for full time for 21 days

5.7.1.5. Lots 2, 3 & 4 were cured as follows: i) Minimum 01-day immersion was done; a few batches were in water for 5 days depending on non-productive days ii) A separate person was engaged to pump water minimum 1.5 hr. time interval iii) Water was sprinkled for 21 days in full day time

5.7.1.6. Why there is an issue on curing:

- i. Claimant has not followed CIDA guidelines in specification book to immerse 7 days
- ii. A tank having space for 300 block cannot be used when the casting rate was 400 blocks per day
- iii. hence the above explained curing process was done
- iv. T.O. of the department magnified this curing issue due to some internal conflict with the lower staff at site

5.7.1.7. The claimant's original plan was for outside supply; Due to the situation in the country it was not possible. Then this arrangement was done

5.7.1.8. Claimant requested to carry out compressive strength test; but it was not accepted by the respondent

5.7.1.9. T.O. of the department took the decision to remove blocks out of the site. This is supported by the Engineer

5.7.1.10. Communication by the Engineer by letter or log note is only valid. T.O. has taken the decision without the Engineer. This situation is highly regretted

5.7.1.11. Our experience in general at other sites supervised by the building department was immersion curing one day and sprinkler used on the stack after that. This practice was allowed and CIDA specification 7-day immersion was not compulsory

5.7.1.12. Cost for casting 2300 blocks is about 505,000.00 LKR This is not because of any fault of the contractor

From reply to SOD

5.7.1.13. The adjudicator has to approve the quality of blocks based on compressive strength otherwise approve the incurred cost

5.7.2. The respondent submitted

In SOC

5.7.2.1. Occurrence of the events are given in a table in SOD

5.7.2.2. Quality assurance should follow general specification given in contract as CIDA publication

- 5.7.2.3. Mix ratio has been supervised. Generally casting was done from 9 am to 6 pm which was accepted and supervised
- 5.7.2.4. Immersion curing and wetting in stack too was not clearly methodical. Details are given in SOD
- 5.7.2.5. Claimant is misrepresenting facts
- 5.7.2.6. Regarding the curing tank size and the problem of immersing 7 days is a situation created by the claimant, as the Engineer did not instruct size etc. for curing tank
- 5.7.2.7. The department allowing different from specification has not happened and this is a false statement
- 5.7.2.8. Engineer and the Engineer's representative's instructions are recorded in log note and letters
- 5.7.2.9. The claim is denied

From rejoinder

- 5.7.2.10. The respondent's stand is the same as in SOD
- 5.7.2.11. There is enough space for the curing tank within the premises. Contractor's staff should plan it, as adequate for the need
- 5.7.2.12. The Engineer has not accepted the claimant's method
- 5.7.2.13. Engineer stands for quality and durability of work. Therefore, the respondent stands with the Engineer's decision
- 5.7.2.14. The strength test allows the quality but durability is unknown so, the Engineer's stand for following specifications is supported

5.7.3. The adjudicator's reasoning

- 5.7.3.1. This matter was discussed at the site visit in February x+2 and during the hearings
- 5.7.3.2. The parties agreed to drop the dispute and the adjudicator advised the parties
 - a) to take over the building without block work;
 - b) the contractor to take back the material as excess material after completion of the contract;
 - c) as this is a special type and not salable in open market, the Engineer to introduce other contractors using same type block stones for department works, so that the claimant and the party will make the deal without the Engineer's involvement

5.7.4. Adjudicator's decision

- 5.7.4.1. **The dispute is considered as withdrawn by the parties**

5.8. Dispute 8 – Retention money should be released after handing over the project

5.8.1. The claimant submitted

5.8.1.1. As the contract is terminated mutually, there is no meaning of holding the retention money

5.8.2. The respondent submitted

5.8.2.1. The MOU point 5 “all other terms and conditions of original contract agreement No NP/B/A/11(2021) remains unchanged”

5.8.2.2. Therefore, the particular clause No 48 and respective contract Data will be considered for the clarification the release of retention money.

5.8.3. Adjudicator’s reasoning

5.8.3.1. The contract is terminated on mutual understanding by signing a MOU, though the MOU document has shortcomings

5.8.3.2. When a contract is terminated the contractor should be relieved of all obligations when agreed conditions are met and when the project is taken over by the Employer

5.8.3.3. After being considered relieved, the retention and all dues to the contractor should be paid as soon as practicable

5.8.4. Adjudicator’s decision

5.8.4.1. The retention money should be released when the project is taken over by the Employer

5.9. Dispute 9 – [Loss of profit for omitted BOQ items as per MOU agreed]

5.9.1. The claimant submitted

5.9.1.1. $25,988,000.00 - 10,000,000.00 = 15,988,000.00$ approximately (to be calculated after actual work is done)

5.9.1.2. Loss of profit at 10%

From reply to SOD

5.9.1.3. The claimant was ready to do the entire project if actual price escalation cost is paid. Therefore, loss of profit has to be paid

5.9.2. The respondent submitted

5.9.2.1. The MOU is based on National Budget Circular No. 03/x+1 dated 26/04/x+1

5.9.2.2. The MOU has been signed with point 2 “The both parties mutually agree not to implement the sub clause 60.1 and 60.2 of the contract data and COC that may bring disadvantage to the government and the contractor.....”

5.9.2.3. As the MOU has excluded clauses 60.1.and 60.2 The claimant is not entitled

From rejoinder

5.9.2.4. Delay is due to contractor’s fault. Hence EOT cannot be given. Therefore, LD has to be imposed

5.9.2.5. Hence loss of profit cannot be considered without due EOT

5.9.3. The adjudicator’s reasoning

5.9.3.1. As explained under 5.8.3 1 and 5.8.3.2 above after signing the MOU, the claimant has no right to make extra claims afterwards

5.9.4. Adjudicator’s decision

5.9.4.1. The claim is disallowed

SUMMARY OF THE ADJUDICATOR’S DECISION

Dispute No	Description in brief	The decision
1	Approval for Extension of Time [EOT] for valid reasons submitted by the claimant and conditions applicable before MOU was signed with the Employer	49 days are allowed as EOT over and above what has been approved by the Engineer LD should not be imposed for this period
2	Reimbursement of loss incurred for materials due to price increase caused by the economic crisis beyond CIDA bulletin indices-based calculation	Calculation has to be done by the Engineer and the parties as per the guideline given in this report Extra payment has to be made for sand aggregate and gravel over and above the normal price fluctuation payment made under IPC For steel same payment has to be done without using value of steel work done for the price fluctuation formula There should not be any special consideration for cement

3	Approval of ESR works which were not approved by the respondent	No special rate need be considered EXCEPT FOR screed concrete formwork at the same rate as D22 in BOQ
4	Claim for overhead cost as per Hudson formula for the period delayed by the respondent	Not allowed
5	Reimbursement cost for preliminaries and salary of the Technical Officer only for the delayed period caused by the respondent	Payment should be made at BOQ rates only
6	Interest claim for the imposed Liquidated damages without valid reasons	LD imposition <u>without valid reason</u> was not established. LD values have to be adjusted as per the adjudicator's decision
7	Concrete blocks at site which are not approved	The dispute is withdrawn
8	Retention money to be released after handing over the project as there is no meaning to hold retention money after mutual termination	To be released after the project is taken over by the Employer
9	Loss of profit for omitted BOQ items in the original agreement	Claim is rejected

This decision is given on 20 day of April x+2 at an arbitration center in Colombo, according to the contract clauses 24 and 25 and the tripartite agreement signed by the parties with the adjudicator under clause 25 of the construction contract between the parties

Eng. X

Adjudicator

Lessons

1. Claimant unsuccessfully, made a valiant effort to prove that he made assumptions to price block casting, internal roads and dealing with water which are covered in specifications. The Engineer has not quoted the specification requirements, which clearly show these are contractor's responsibility.
2. MOU draft has been wrong and one sided. The contractor has signed it with a foot note but the emphasis has not been given for what is important. The DB has well explained the MOU situation and the purpose it should have been aimed at.

3. A Claimant has no right for interest when he has not even mentioned of the cost needs [not an estimated value] but as per SBD documents the right is not lost as is in FIDIC conditions. So, request has been allowed as a new claim at the time of adjudication without any interest payment.
4. It should be noted payment of interest on delayed payment is a matter to be claimed in the next IPC and early warning is not needed because the clause says “it should be paid” there is no mention of early warning requirement
5. Communication and records are very poor and the Engineer has depended too much on Technical Officer and the site staff from both sides have not been cooperative. The contractor should have discussed these openly with the Engineer and the contractor and Engineer should have involved themselves, depending less on their representatives, when issues are arising
6. Reader may study carefully the adjudicator’s reasoning to overcome the ineffectiveness of the price escalation indices given in the CIDA bulletin during the abnormal market situation due to Covid and economic crisis in the country.

Post script

Claimant disagreed with the decision

Chapter 3

The dispute:

The dispute consists of 14 referrals on various headings [they identified as separate disputes] but basically, on Extension of time, variations, Payment errors, wrongly imposing delay damages, Interest payments, Profit and Overhead for lost scope and Additional overheads for delayed period. The claimant got above 30 million as compensation in the decision in the adjudication and the respondent disagreed and sought arbitration. The remedy sought and award are given in a table at the end of dispute analysis. As the dispute was referred for arbitration, before the completion of the project, after the hearing parties requested for a stage 2 hearing for disputes 1 and 4 as they are relevant for extra time, delay damages and overhead cost for extended period

The background:

The project is for construction of an office complex. The work had been done in stages and involving many contractors, some of them working at different locations within the premises, during the same period. The dispute related contract is to construct 02 wings of the building, a canteen and both the middle section and the road under Provisional sum items. In early months at a meeting, it had been informed that the middle section will be done through a separate contract and no drawings or work details were issued, to this contractor. Provisional sum allocation of the road works had been instructed to this contractor, even after the last extension of time allowed too, was over.

The contract document appears to be hurriedly prepared, with so many provisional sum and preliminary items, some of which have not been done at all. Some Special Conditions included in Contract Data, are very arbitrary, e.g., the profit and overhead percentage is fixed. Labor and material cost shall be, as in district buying committee rates, the technical staff to be engaged by the contractor paid under a preliminary item, if not engaged, the same amount will be deducted monthly from interim payments throughout the contract.

The contract conditions are ICTAD/SBD 2 and the specifications are ICTAD/ SCA VOLUMES for buildings, water supply and roads

Contract administration too is amusing. The program submitted, consisted of activity time schedule only. Resource schedule and method of construction are not asked for. The project is said to be quality assurance, but no QA report has been submitted at the start. The activity time schedule had not been revised, even at time extensions. The contractor has ignored the Engineer's instructions many times. When notice to correct was given, the items to be completed and time targets had not been agreed, on a weekly or fortnightly basis. Just 2 months are given to complete the whole works.

[As the writer could get the full document of decision by the adjudicator it is included with minimum correction removing possible identification of the parties]

This case is very lengthy but there are many interesting things to read, the way they have worked and the way they have worked to fight the claim referring many documents, whereas they have not referred standard specifications and contract clauses while construction was on.

Admissions and issues:

Admissions and issues raised by the parties are long lists and some are overlapping. Also, the relevant issues can be understood by a reader having any background knowledge of construction disputes, when Contractor/claimant's contention and the Employer /respondent's stand are carefully read

Proceedings:

Proceedings are not attached to maintain privacy as well to avoid a long list of questions and answers which are not really required to grasp the essence of the dispute

1. **Dispute analysis** [To avoid identification of the project, x is used to indicate starting year in letter references etc. Also supporting document copies are not attached, though it may sometimes appear in descriptions as according to "... any reference]

1.1. Dispute 1. Extension of time was not granted

1.1.1. Claimant's contention

- 1.1.1.1. EOT 1 for the period from 04/05/x to 31/10/x was requested on 02/05/x;
Engineer's representative granted up to 25/10/x by letter dated 07/11/x
- 1.1.1.2. EOT 2 for the period from 25/10/x to 30/04/x+1 was requested on 25/10/x;
Engineer's representative granted up to 10/02/.x+1 by letter dated 05/03/x+1
- 1.1.1.3. EOT 3 for the period from 10/02/x+1 to 30/04/x+1 was requested on 09/02/x+1;
Engineer's representative granted up to 30/04/x+1 by letter dated 26/05/x+1
- 1.1.1.4. EOT 4 for the period from 30/04/ x+1 to 30/10/ x+1 was requested on 06/07/ x+1;
Engineer's representative granted up to 30/10/ x+1 by letter dated 14/09/ x+1
- 1.1.1.5. EOT 5 for the period from 30/10/ x+1 to 31/01/ x+1 was requested on 06/07/ x+1;
Engineer's representative granted up to 31/12/ x+1 by letter dated 18/12/ x+1
- 1.1.1.6. EOT 6 for the period from 31/12/ x+1 to 30/08/ x+1 was requested on 20/05/ x+2;
Engineer's representative granted up to 31/08/ x+2 by letter dated 22/09/ x+2 on ex-gratia basis

1.1.1.7. Ex-gratia basis is not acceptable as instructions are given even later – affected work is road work only - instruction given by letter dated 21/ Jan/ x+3 on ABC filling details

1.1.1.8. Further submissions by claimant are dated,09/06/ x+3, 12/10/ x+3 and 02/12/ x+3

1.1.2. Respondent's stand

1.1.2.1. Requested EOT in the above 1.1.1.1 to 1.1.1.5. have been granted

1.1.2.2. There were minor changes in drawings but most of the required drawings / instructions were given as shown in table 7 of SOD

1.1.2.3. Later it was decided to execute road works through the claimant on 30/10/x and the drawings were handed over to obtain his rated BOQ, which was not finally agreed till 24/06/x+1. This work was not completed until the date of SOD i.e., 01 / 09 / x+2

1.1.2.4. As more than adequate EOT has been granted, ex-gratia EOT was given to complete the project without terminating and retendering remaining works

1.1.2.5. Contractor requested instruction with lot of time gaps

1.1.2.6. Further submissions by respondent are dated,15/08/x+3, and 04/11/x+3

1.1.3. Arbitrator's reasoning

1.1.3.1. Extensions 1 to 5 are granted and used and there cannot be any issue [except payment of cost under subsequent disputes]

1.1.3.2. The Engineer approved up to 22/09/x+1 on 31/08 /x+2 as ex-gratia without any cost to avoid paying cost for extended period, to avoid termination AND to save contractor from LD

1.1.3.3. As per further clarification given by the respondent to the arbitrator dated 18/02/x+3, the last instruction given is on 12/02/x+2 on roadwork and drainage. As per claimant, last instruction given date is 21/01/x+3 for road curbs.

1.1.3.4. The Engineer knows what work is to be done; what is the scope of the work; thus, when the contractor did this a few times, the Engineer should have studied and given all required instructions and directed the contractor to ask for further instructions if he has any, within a time period fixed by the Engineer. In the proceedings it was revealed that for road construction, drain level, road finish level, gravel spreading area etc. were instructed, on contractor's request with gaps of months. Here the contractor had been shrewd to trap the Engineer

1.1.3.5. As per contract clause 3.3 "The Engineer may issue to the contractor instructions [at any time] which may be necessary for the execution of the Works and remedying of any defects, all in accordance with the contract.....These

instructions shall be in writing.” Nowhere it is stated in the contract conditions under “clause 4 – contractor”, that the contractor shall request instructions from the Engineer and when he should do so.

- 1.1.3.6. Therefore, any delay in giving instruction, is a lapse by the Engineer in contract administration and the effect of such delay has to be considered as Employer’s risk, as the Engineer is working on behalf of the Employer, under sub clause 17.3 g.
- 1.1.3.7. The road work and road drains are not in BOQ. So, it has to be extra works. There is no record that the contractor has to do any design works. Thus, the road work does not fall under contractor’s design. Then any detail of levels etc. as arisen in proceedings on 06 /January /x+3, dispute No 4 issue No149 under respondent’s reply referring to issue No 40 of claimant are the instructions [levels, slopes etc.], the Engineer should have given.
- 1.1.3.8. The contractor needs time to carry out the instruction and that time too should be added to the date of instruction to decide the date of EOT entitlement of the contractor. As the contractor is mobilized at site no preparation time need be allowed, unless the contractor has pointed out such situations, no sooner than the instruction is received. The actual work days should be taken from contemporary records, if the resources used is reasonable because, respondent has been complaining of inadequate labor deployment
- 1.1.3.9. Once this last date of EOT entitlement of the contractor is decided, any time spent beyond that date may be under LD or considered in an ex-gratia basis as the Employer wishes
- 1.1.3.10. However, this construction contract consists of - a part of the building 69 million approx., canteen block 48 m approx., and provisional sum works 35 m approximately, of which road & landscaping works is 9.8m approximately. So, the instruction delay is only for road & landscaping works and hence EOT period as explained in 1.1.3.7 to 1.1.3.9 above, shall be for road & landscaping works only and other works should be completed as per the EOT recommended by the Engineer and Ex-gratia conditions given by the Engineer will be valid for building work but NOT FOR road & landscaping works
- 1.1.3.11. Also, it should be noted that, the building has been occupied by the Employer the lift has been functioning from 14/02/x+1 Thus, the multi-storey section can be considered in use only after this date of 14/02/x+1. So, the EOT will be effective as approved by the Employer for work done after this date for the building works. Ex-gratia EOT is effective for work outside these considerations only.

1.1.4. Arbitrator's decision

- 1.1.4.1. Last date of eligible EOT is, 21/01/x+3 [further clarifications] + allow for execution 10 days = 31/ January/ x+1 for road works
- 1.1.4.2. All days spent until the parties agree to take over [even with a list of defects; inspected on 22/04/x+3] shall be subject to liquidated damages as per contract, unless occupied by the Employer before that date [ref contract sub clause 10.2]
- 1.1.4.3. If any part of the building was not occupied LD will be applicable from 31/08/x+2 [extension 6] to that date(s) [refer stage 2 arbitrator's reasoning 1.3.6] and no compensation or other cost has to be paid after 31/12/x+1 [extension 5] as ex-gratia EOT is applicable to all building works as no instruction has been given in this period regarding buildings
- 1.1.4.4. Final decision on this will be after stage 2 considerations which is given under stage at the last section of the award**

1.1.5. STAGE 2

- 1.1.5.1. Claimants' contention [additional points submitted on stage 2 only are listed; repetitions from stage 1 submissions are disregarded here]
- 1.1.5.2. Another extension till 30/08/x+2, was followed "without any restriction made for the extension but based on the Employer's risk that would have occurred prior to 30/10/x+1, which we shall overlook for convenience" [This is contrary to EOT 6 acceptance under stage 1] Reference letter given is letter dated 12/08/x+2 asking for claimant /contractor's consent for "without any compensation or prolongation cost"
- 1.1.5.3. Obstructions happened from 30/10/x+1 to 30/08/x+2 are listed;
 - No.1 - Difficulties in supply of material and manpower, due to Covid-19;
 - No.2 - Rate for provisional item- drainage was approved late, we had to wait to commence work till October/ x+2 and was obstructed several times due to intermittent rain;
 - No.3 - Several IPC payment - delays [This is compensated under another dispute; time effect of payment delay is not quantifiable easily];
 - No.4 - Rates for items of excavation and compaction could not be agreed in a short period such delays made a setback to start works.
 - No.5 - Adjudicator determined above 30 million was not paid and other amounts due from work under dispute on interest;
 - No.6 - When requested details and a BOQ for road works, which is a provisional sum, the Engineer asked to concentrate on unfinished works as it was too early to request such detail

- 1.1.5.4. Chief Engineer requested the contractor to borrow some money and finish the work and Payments can be made. But so far, no such payment is made for the now completed works
- 1.1.5.5. Ex-gratia situation comes, if the Employer has no obligation to grant EOT. Here, the Employer has created obstructions and hence has obligation to grant EOT from 30/08/x+2 to 30/10/x+2; CONSTRUCTION PERIOD BEYOND 30/10/ x+2 TILL 09/03/x+3
- 1.1.5.6. New target dates for completion were given without informing of any ex-gratia condition as listed
- 1.1.5.7. Target till 12/01/ x+3 was given by letter dated 20/12/ x+2
- 1.1.5.8. Another target was given till 25/01/ x+3 by letter dated 29/12/ x+3 till 08/02/2022 IPC 28 and 27 were not paid thereby causing obstruction for construction
- 1.1.5.9. After many requests instructions for curb laying was given by a letter dated 20/01/ x+3
- 1.1.5.10. Additional works on electricity supply was given on 17/01/ x+3 and was completed and informed to the Engineer on 21/02/ x+3. Therefore, another extension was requested up to 28/02/ x+3
- 1.1.5.11. Instruction to spread gravel was given on 24/02/ x+3
- 1.1.5.12. Another extension was granted till 09/03/ x+3 [ref. page 42 of stage 2 SOC – This is a date to hand over]
- 1.1.5.13. Instruction was given to hand over the building and the road on 22/08/ x+3
- 1.1.5.14. As explained above if there is any LD to be imposed, it should be after 22/04/ x+3 – [This LETTER IS handing over arrangement and notice for some defects / omissions]
- 1.1.5.15. Level points were not available on 23/10/x+1
- 1.1.5.16. Covid-19 situation difficulties continued
- 1.1.5.17. Respondent admits giving details and layout on 18/08/x+1 for drainage and collecting chamber
- 1.1.5.18. Road Development Department guidance was received on 03/02/ x+2;
- 1.1.5.19. Hence Extension should be granted till 22 /04/ x+3
- 1.1.5.20. Respondent's stand
 - 1.1.5.20.1. Extension after 31/12/ x+1 only need be taken up, as the extensions up to then had been submitted discussed in the hearing and need not be repeated.
 - 1.1.5.20.2. Ex-gratia extension had been granted twice to 31/08/ x+2 and 30/10/ x+2
 - 1.1.5.20.3. A list of events numbering 34 rows in a table is provided indicating request for information /instruction/time extension; and instructions given for road works. Some of them are recorded in stage one submission and in proceedings

- 1.1.5.20.4. The claimant has shown 12/01/x+3, as new target given for completion, whereas the letter referred is a notice to correct, indicating outstanding work too.
- 1.1.5.20.5. Another target date given to complete the works as 25/01/ x+3 is also, another letter on notice to correct, giving a list of unfinished works in buildings and road works.
- 1.1.5.20.6. To prevent an Employer's claim and considering all what the contractor is highlighting and the fact that the contractor has delayed road works for 7 months, ex-gratia extension was given.
- 1.1.5.20.7. No payment has been withheld other than LD, as the contractor was continuously neglecting to attend the works.
- 1.1.5.20.8. The respondent has attached non -working days in road and drainage works.
- 1.1.5.20.9. As the claimant idled and there were days without work, the respondent was compelled to avoid giving ex gratia extensions beyond 30/10/x+2; LD was imposed.
- 1.1.5.20.10. Respondent submitted 3 tables to detail out, countering the claimant's points in reply to SOD etc. showing correspondence regarding road works, progress review meeting details and idle days in road works

1.1.5.21. Arbitrator's reasoning

- 1.1.5.21.1. The last instruction given according to the claimant are for curbs 20/01/ x+3 and gravel spreading 24/02/ x+3 and electric supply for canteen block is on 17/01/ x+3 and this electrical work was completed and informed on 21/02/ x+3
- 1.1.5.21.2. Respondent has not given any details on the electrical supply to canteen block; gravel spreading is a matter, that will have no effect on use of the premises other than appearance and such work may be instructed even during defects correction period and need not be considered a late instruction
- 1.1.5.21.3. In stage 1 itself, the arbitrator has allowed reasonable time for curb fixing and the last date of allowable extension for road works had been **decided as 31/01/ x+3. There need not be any change for it**
- 1.1.5.21.4. **Regarding work in canteen block, why such late instruction was given cannot be understood; however, the last date of construction for canteen block will be considered by the arbitrator as 21/02/ x+3**
- 1.1.5.21.5. Please **refer to item 1.1.3.9 indicating the BOQ distribution of works, SO THE DELAY IN WORKS CAN BE WORKED FOR DIFFERENT SECTIONS AND 'LD' CAN BE APPLIED PROPORTIONATELY**

1.1.5.21.6. **LD period shall be up to the date of handing over the project i.e., 22/04/ x+3 from a) for road works 31/01/ x+3 = 81 days and b) for canteen block 21/02/ x+3 = 60 days c) Building works from the last date of ex-gratia extension given as accepted by the parties 31/10/x+1, to the date of occupying the building, i.e 16/05/x Left wing & 25/10/x Right wing = 0 days as the occupation is before the ex-gratia extension is over**

1.1.5.22. Arbitrator's decision

1.1.5.22.1. Ex-gratia extension is correct because the Employer decided to continue with a contractor not showing commitment but highlighting difficulties only. Covid-19 situation created problem to the entire industry, is also true and the respondent deciding to save the contractor from LD is appreciable

1.1.5.22.2. The contract can be considered as taken over by parts as per contract clause 10.1, because the buildings were occupied before the FINAL OFFICIAL TAKING OVER date of 22/04/x+3

1.1.5.22.3. **LD deduction shall be 2,460,000/= LKR as decided by the arbitrator**

1.1.5.22.4. Any LD deducted before giving ex-gratia extension up to IPC 25 had been corrected by the respondent. Situation with respect to interest has been analyzed by the arbitrator in stage 1 under dispute 10. **LD deduction after x+2 [after IPC 25] for contractor not attending works for long periods, HAS TO BE REPAYED BUT WITHOUT INTEREST because the respondent could have terminated the contract for no progress more than 28 days as per clause 15.2 (b). The respondent had been too much sympathetic to the contractor**

1.2. Dispute 2 - Refusal to pay the items P4, P8, P13 given under preliminaries during the initial contract period

1.2.1. Claimant's contention

1.2.1.1. Item P4- Allow sum for constructing, maintaining, dismantling and removal on completion of works, a temporary building for Engineer's office.....;

1.2.1.2. The notes given at the beginning of the BOQ items, under mode of payment for preliminaries category states, this item should be paid 60% on completion of the building and 30 % proportionately in the period of use and 10% on dismantling and removal

1.2.1.3. The respondent did not follow this in interim payments except for IPC 5 though the claimant has included the item from IPA No 1

- 1.2.1.4. The claimant should be paid the unpaid amount correctly, including maintenance part for the full period and the interest for the period from due date, to the date of arbitral award
- 1.2.1.5. Further clarifications –initially paid in bill 5 is, 133,931/= LKR. Amount supposed to be paid in bill 13, is 174,695/= LKR and references are in Reply to SOD. The building was used by either party till 01/08/x+1 only

1.2.2. Respondent's stand

- 1.2.2.1. Item was paid till 7th month [hearing 2 under dispute 2]
- 1.2.2.2. Thereafter not paid as the contractor stored materials in it.
- 1.2.2.3. There is no proof that the claimant maintained it after that [claimant agreed there is no proof though maintained]
- 1.2.2.4. Paid 118,931/= as 60% + 4 months maintenance only throughout the contract.
- 1.2.2.5. The claimant's use of it as stores is accepted in reply to SOD page 12,
- 1.2.2.6. At the hearing, the claimant accepted that he used Engineer's facility to store the air conditioners after the Engineer moved to another office space in the building, which is not a part under this contract.

1.2.3. **A. Arbitrator's reasoning**

- 1.2.3.1. If the temporary building is constructed, 60% payment should be made when requested. If there was a delay in not paying the item, claimed cost should be used for interest calculation up to the date of payment, at the contract agreed rate of lending rate +1% from Central Bank data.
- 1.2.3.2. If the period of delay is not less than the initial contract period, the rate of interest shall be legal rate of interest, because the contract conditions specially say the Engineer SHALL CERTIFY AND EMPLOYER SHALL PAY. This condition of contract is expected to be observed by the Engineer, and the agreed interest rate is to be applicable. The Engineer cannot delay payment for any item, for many months for his convenience or as he wishes, causing the contractor to borrow from a bank or others. Note should be made that Temporary Over draft [TOD] interest rate is currently [year x+2] around 16 % and varies slightly from bank to bank.
- 1.2.3.3. The fact that mobilization advance is paid or, unrecovered mobilization advance money, is with the contractor, is not a sound argument to refuse higher interest rate because, by this time, the contractor would have spent the money in other material stocks or paying advances. The Employer/Engineer could have monitored this, in progress review meetings, as to what materials are stocked and advances are paid from the contractor, to ensure the proper utilization of mobilization

advance. Though the statement was made that proper use was not made, no documentary evidence was mentioned in the proceedings.

- 1.2.3.4. Maintenance cost should be paid for the period the Engineer used it. Even after if the building was maintained, the cost should be paid because, using or not using, is the Engineer's decision. The Engineer could have asked the contractor to remove his items and used it. There was no record of such request and contractor not obliging, in the submissions or proceedings.
- 1.2.3.5. Therefore, the Arbitrator concludes that the Engineer left the office for his wish and using contractor's wrong action as an excuse and THE CONTRACTOR USED THE BUILDING FOR HIS STORES. So, there is no justification for maintenance cost to be paid after the Engineer stopped using the building
- 1.2.3.6. As per further clarification given by the respondent dated 18/02/x+3 the Engineer did not use the building from 30/08/x. Thus, maintenance should not be paid beyond this day, but construction and dismantling [when completed] costs have to be paid
- 1.2.3.7. **Under claimant's issues the claimant stated, the building was maintained till initiation of road works which the respondent did not deny. 22/07/x+1 is the date of instructing road work.**
- 1.2.3.8. Respondent has stated the building was used as contractor's stores Item B6; so, the payment for this period shall be based on Item P 6 rate for maintenance of stores and workshop.
- 1.2.3.9. Item cost is 47,470/LKR as per BOQ. 30% of this cost for 15 months provides basis for calculation of monthly rate, i.e., $47,470 \div 15 \times 30\% = 949$ LKR
- 1.2.3.10. IPC 4 is the last paid and this IPC date is 07/09/x-1
- 1.2.3.11. Parties agreed the bill [IPA 13] claimed date as 08/05/x i.e., the agreed contract period.
- 1.2.3.12. Since there is another dispute covering delay in IPC payments [dispute 11], the interest ***calculations shall be for each individual item calculated for difference in payments in each bill [IPC] because, there will be a duplication of interest calculation otherwise.***
- 1.2.3.13. **A. Arbitrator's decision**
- 1.2.3.14. Pay proportionate value of maintained months as per contemporary records or already paid period, which is higher divided by the contract period x 30% cost + 10 % cost after dismantling and removal + interest for the un- paid amount from the date to end of initial contract period, at the agreed interest rate in contract; + interest cost for the same amount at legal rate, from that date to the date of arbitral award.

1.2.3.14.1. **As Engineer's site office**

- Construction cost = $60\% \times 142,414/- = 85,448/-$
- Maintenance cost from IPC 1 to 30/08/x-1 i.e., IPC 4 dated 07/09/x-1
- Maintenance period allowable = $30/08/x-1 - 05/02\ x-1 = 6\ \text{month} + 25\ \text{days}$
- Maintenance cost allowed = 30% for 15 months i.e., 2% per month, = 2848/-
- IPC 4 is the last paid [proceedings item 59 of claimant]; due date is 27/08/x-1; date of payment is 09/07/x-1.
- Dismantling and removal are not CLAIMED.

Used as Contractor's stores

- Period = $05/08/x - 30/08/x-1 = 319\ \text{days}$.
- Amount due for use as store = $319 \times 949.00/30 = 10,095/=$ LKR
- Period after the initial contract period = $21/07/x+2 - 04/05/x+1 = 444\ \text{days}$ [dispute 3]
- Interest for payment for delay should be calculated from 30/08/x-1 up to 04/05/x at contract agreed interest of 1%+ lending rate

Interest calculation shall be for the difference in payments as there is a separate claim for delay in payments of IPCs in dispute 11

- 1.2.3.15. The interest calculation has to be extended to the award date, as decided by the arbitrator calculated to **30 September x+3**

The amount awarded is 12,550/= LKR

1.2.4. B item P 8 - A lump sum allowed for employing qualified experienced technical personnel

1.2.4.1. **B Claimant's contention**

- 1.2.4.1.1. All Deductions should be paid with financial cost; because the contract condition for 'deduction if not provided', is **not compatible with unfair terms contract act No 26**.
- 1.2.4.1.2. Hence attendance sheets need not be submitted as per contract. But for some months the attendance sheets have been submitted.
- 1.2.4.1.3. Attendance is in log book records; Attendance summary is in SOC page 229.
- 1.2.4.1.4. Engaging better qualified persons shall not be a problem.
- 1.2.4.1.5. Attendance sheets were attached from IPA 13 but not in IPA 8.
- 1.2.4.1.6. The CIDA act states that it cannot be changed without approval from CIDA.
- 1.2.4.1.7. Further clarifications- Respondent paid in bill No 13 is 653,814/= LKR and amount supposed to be paid is 926,867/= LKR; references are SOD page 960 and 596 where 273,048/= deducted in comparative statement respectively.

1.2.4.2. B. Respondent 's stand

- 1.2.4.2.1. The clause is not contrary to sections 3, 4, 5, 9 of the unfair contract terms act No. 26 of 1997.
- 1.2.4.2.2. This contract requirement was there in bid document and contract data [particular condition] and the contractor knowingly agreed.
- 1.2.4.2.3. The required staff was not engaged continuously for the full period. When 02 Technical officers were specified 02 engineers were engaged.
- 1.2.4.2.4. The attendance sheets were not attached in IPA and it is a contractual requirement to pay.
- 1.2.4.2.5. No payment is withheld; corrections are made as per contract clause 14.3 in contract data. Calculation is shown in SOD.
- 1.2.4.2.6. Interest calculations are shown in table 9 of SOD for compensation.
- 1.2.4.2.7. As per CIDA act a change in contract condition of standard document is not illegal only if so, decided in a court of law.

1.2.4.3. B. Arbitrator's reasoning

- 1.2.4.3.1. It is clear from the submissions and the proceedings; the required staff had not been engaged throughout the project period.
- 1.2.4.3.2. But the service had been provided; but it is not revealed whether the required service was available when actually needed.
- 1.2.4.3.3. In this project execution, contract requirements have not been seriously followed by both parties. Contemporary records are less and the logbook is the only document mentioned in the proceedings and some correspondence.
- 1.2.4.3.4. The claimant admitted not submitting the attendance sheets with the claim for the item. In such a situation the Engineer cannot pay in the same IPC, unless the contractor brings it during the checking period. The Engineer has not shown the shortcomings and asked the contractor to attend. From the proceedings it reflected that parties had no good relationship for such cooperation.
- 1.2.4.3.5. If the maintenance of contemporary records is by the log book, the Engineer knows the presence or absence of the required staff, if he goes to site and checks the log book at least weekly. Though without support document the Engineer cannot certify payment, the fact that the service is provided cannot be denied. But payment can be made only if the attendance sheet is attached.
- 1.2.4.3.6. The payment for the item shall be only for the months [or part] when the staff was available only, as per contemporary records that are jointly agreed even now.

- 1.2.4.3.7. The Engineer can certify the payment only when the attendance sheets are provided may be in a later IPA. So, the payment delay shall be considered only from the date of submission of attendance sheet for the relevant IPC, not the month of attendance, as the 'time of event for claim'.
- 1.2.4.3.8. This delay shall be paid at agreed interest rate in the contract for the cost of finance, if it is less than initial contract period from the date of submission of attendance sheets. The Engineer cannot pay this item alone if attendance sheets are submitted at an in between period; he has to keep it to pay for in the next IPC. With this consideration if payment time is after initial contract period, for that period interest calculation shall be at legal interest rate.
- 1.2.4.3.9. The arbitrator's decision for two interest rates is explained in the above item P 4 situation and will be the same for all delay payments
- 1.2.4.3.10. According to the argument by the respondent, the condition is known from the time of bidding and the contractor signed and agreed. The contractor has not followed the sub clause 19.1 to make his claim. **The protest came at the time of adjudication**
- 1.2.4.3.11. The contract condition 19.1 states "The notice shall be given as soon as practicable, and not later than 28 days after the contractor became aware..." and "within 84 daysthe contractor shall send to the Engineer a fully detailed claim....". Both these are 'SHALL BE' CONDITIONS i.e., MUST BE DONE. So, by not doing the contractor has given up his right for a claim.
- 1.2.4.3.12. The term "shall be done" is a MUST. If the contractor has not done so, he has not followed the contract conditions. It is a breach of contract though not fundamental. The contractor has neglected his right for claim. Therefore, it is a situation the contractor has given up. He has no right to claim later unless the Engineer/Employer is willing to consider. The arbitrator will not decide against the contractual situations as there is no difficulty in following this contract requirement
- 1.2.4.3.13. But the contract clause does not prohibit the contractor from making a claim in an arbitration or adjudication situation. So, the Arbitrator will decide it as an open situation. But the Engineer cannot be found fault for assuming the contractor has given up his right. Even if the arbitrator decides that the claim can be considered, the due date of the claim shall be the date of requesting not the date of the event, as the contractor has given up by not observing contract requirement. The difference can be felt if compared with FIDIC contract conditions where it is written off for delay in the second paragraph of sub clause 20.1; "If the contractor fails to give notice of a claim within such period of 28 days, the time for completion shall not be extended, the

contractor shall **not be entitled** to additional payment and the Engineer shall be **discharged from all liability in connection with the claim.**”

- 1.2.4.3.14. The parties made in their submissions that the CIDA has made conditions that the contract conditions in standard documents should not be changed without approval of CIDA. Respondent did not submit any such approval was obtained from CIDA to support this. However, the Respondent considers clauses can be amended under particular conditions of contract; means contract data.
- 1.2.4.3.15. The disputed clause is 14.3 applications for interim payment, which is a PAYMENT CLAUSE. By this amendment the Respondent / Employer had made the clause a DEDUCTION CLAUSE. So, the amendment has negated the meaning of the clause. Thus, the particular clause is wrong for the deduction part but can be applicable for the payment part only.
- 1.2.4.3.16. The ACT No 26 [on unfair terms] says if the conditions are agreed by the parties and had a prior knowledge of the cost for him such can be accepted [relevant clause *is 14.3 addition in contract data*] *not falling in the category of unfair terms*
- 1.2.4.3.17. At the time of signing the contract, the contractor and the other party expected to complete the works in the agreed period. So, the Act 26 section 10.1 is valid within the original contract period. Thus, the ONLY THE DEDUCTIONS DURING THE EXTENDED PERIOD falls in the category of unfair term, if the condition is *applied to the extended period, because the contractor never knew the full period of time extensions* before start of the contract.
- 1.2.4.3.18. Therefore, the deductions done in the extended period **have to be repaid as an unfair contract term has been enforced.**
- 1.2.4.3.19. Though the deduction cannot be rejected as per act 26, *the change of a payment clause to a deduction clause under contract data without the written approval of CIDA cannot be considered as a rightful act by the Employer.* **Therefore, all the deductions done under this item should be repaid BOTH within CONTRACT PERIOD AND during the EXTENDED PERIOD under dispute**
3
- 1.2.4.3.20. Attendance summary in page 229 in SOC is different from what has been submitted by the respondent as page 122 of SOD. Arbitrator will take the average for calculations considering minimum 25 work days for a month and 23 days for February to get the rate per day of work.

1.2.4.4. **B. Arbitrator’s decision**

- 1.2.4.4.1. **Pay the claimant for the period of engagement** of required or higher qualified officers engaged according to the principle that a service rendered has to be remunerated unless otherwise agreed to be covered in some other cost. As the parties agreed the log book records should be the basis to prepare attendance sheets. + **Interest** for delay payments should be calculated from the date of giving the attendance sheet up to the date of arbitration award at contract agreed interest rate for initial contract period under this dispute [+ **interest** for the additional delay days at legal interest rate under dispute 3] + **all the deductions + interest** payment for delay in payments with the same mode of interest calculation
- 1.2.4.4.2. ***Interest calculation shall be for the difference in payments as there is a separate claim for delay in payments of IPCs in dispute 11***
- 1.2.4.4.3. **The amount awarded is 0.09 million LKR**
- 1.2.4.5. **C. item P 13 - a lump sum allowed for making adequate provisions against air and noise pollution of the surrounding.** Hoarding and dust screens shall be provided to control dust escaping to the surrounding.
 - 1.2.4.5.1. **C Claimant contention**
 - 1.2.4.5.1.1 The contractor stopped work to avoid noise pollution during council meetings which the respondent accepts
 - 1.2.4.5.1.2 To control dust, we have used nets; [there is no record whether the net was wetted at least for dust to stick.]
 - 1.2.4.5.1.3 Further clarifications- Amount supposed to be paid in bill 13 is 94,943/= LKR,
 - 1.2.4.5.2 **C. Respondent 's stand**
 - 1.2.4.5.2.1 Contractor did nothing except stopping work during council meetings for avoiding noise pollution
 - 1.2.4.5.2.2 Safety nets were provided but it is not a measure for dust control
 - 1.2.4.5.2.3 The claimant has failed to submit any expenditure he made for this purpose, which the respondent offered to pay [ref, page 15S of SOD last lines]
 - 1.2.4.5.3 **C. Arbitrator's reasoning**

- 1.2.4.5.3.1 For any provisional sum to be used the Engineer should instruct the contractor.
- 1.2.4.5.3.2 The rates should be approved.
- 1.2.4.5.3.3 Then only action should be taken to do physical work by the contractor.
- 1.2.4.5.3.4 As per records in the submissions and hearing, the method was not approved or directed by the Engineer nor was there any guidance in contract, what shall be done for noise pollution.
- 1.2.4.5.3.5 The method of noise pollution is unknown to both parties.
- 1.2.4.5.3.6 The parties agree that work was stopped during the council meetings.
- 1.2.4.5.3.7 So, the Respondent's stand to refuse payment for noise pollution is wrong. All payments **due as per contract should be paid for the full approved contract period up to 31/08/x+2. Interest payment should be as stated above for item P 8 & P 4.**
- 1.2.4.5.3.8 Though the Respondent states that there were delays caused by the contractor the EOT request and approval both are not having any break up except in one approval letter [4th extension]. The reasons mentioned are not recorded as contractor's delays. So, payment has to be made for the extended period though the item is a lump sum, considering the contractor had to take the same action all the time for noise control.
- 1.2.4.5.3.9 The arbitrator considers that the possible thing had been done. So, the arbitrator is satisfied that the action taken for noise pollution is adequate under the circumstances of a construction project.
- 1.2.4.5.3.10 Regarding air pollution the only thing done is hanging safety nets. If they were wetted daily at least part of dust would have stuck on to them reducing some dust.
- 1.2.4.5.3.11 The BOQ item description states the use of hoarding boards and dust screens. There was no record of at least this being done in submissions and proceedings except in "reply to rejoinder" where the photos showed netting and roofing sheets not a hoarding board.
- 1.2.4.5.3.12 The contractor's stand that payment should be made for air pollution cannot be considered as he has not even made any effort for reducing air pollution. Though there is a BOQ item, if the contractor has not done work there is no reason to pay the contractor.
- 1.2.4.5.3.13 Therefore, the arbitrator considers there has been no action for dust control and this component should not be an entitlement for the claimant

1.2.4.5.3.14 The BOQ item is one lump sum for both noise and air/dust pollution.
There is no way to separate for the two aspects. Thus, it will be considered half and half

1.2.4.5.3.15 The payment mode given in BOQ is E; i.e., payment shall be in equal amounts throughout the contract period up to 31/08/x+2.

1.2.4.5.4 C. Arbitrator's decision

1.2.4.5.4.1 The payment shall be for the total approved period of the construction time on a monthly basis at the rate of 50% of item cost divided by original contract period i.e., 15 months, multiplied by the approved construction period in months + cost of interest calculated as mentioned above at two rates of interest; i.e., contract agreed and legal interest rates.

1.2.4.5.4.2 a) The amount due is 50% of 94,943/- LKR as lump sum for the original contract period i.e., 47,471/= LKR

b) Therefore, monthly rate is $47,471 / 15 = 3,164/-$

c) Period of payment x-1/02/27 [ref page 319 of SOC] to **31/08/x+2** = $1281/30$ month = 42.7 month

d) The amount due shall be $3,164 / - \times 42.7$ less what has been paid + interest for claimed but unpaid amount ONLY.

e) ***Interest calculation shall be for the difference in payments as there is a separate claim for delay in payments of IPCs in dispute 11***

1.2.4.5.4.3 C. The amount awarded is 0.7 million LKR for noise only

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1.3 Dispute 3 - Refusal to pay items P1, P2, P5, P8, P13 given under preliminaries beyond the initial contract period & compensation due to late recognition

1.3.4 A) Item P1 & P2 [extension of bonds];

A) Claimant's contention

1.3.4.5 The item is a lump sum payment for obtaining bonds. The payment is made and there is no dispute

1.3.4.6 The extension of bonds validity was required at every time extension allowed. The cost of obtaining the bond and the 10% profit and overhead factor was not allowed by the Respondent

1.3.4.7 The claimant has submitted the bank statement in SOC

1.3.4.8 The amount + cost of interest shall be paid as compensation Claimed as 436, 000/- LKR is shown as total due

1.3.4.9 Further clarification – bond extension cost ONLY was paid in bill Nos. 22 and 23

1.3.5 A) Respondent 's stand

1.3.5.5 The respondent admits the delay and willing to pay the Cost and compensation as shown in table 9 under dispute 13 in SOD page 434

1.3.5.6 The claimant submitted supporting documents with IPA 23 and 24 on 14/12/x+1 and 26/03/x+2

1.3.5.7 Further clarification – bond extension cost ONLY was paid in bill Nos. 24 on 29/04/x+2

1.3.6 A) Arbitrator's reasoning

1.3.6.5 There cannot be a dispute as the lump sum had been allowed assuming the construction will be completed in the original contract period. Extension cost will have to be paid on production of expenditure made to obtain the extension of validity + overhead percentage.

1.3.6.6 Here the claimant requests 10% [Ref. SOC page 271, 2nd paragraph "Therefore the claimant is entitled for commission charges + 10% OH/profit factor along with the interest for the delay caused...."]

1.3.6.7 The overhead cost here is the administration cost of the head office of the contractor. This item does not involve any site input and hence any site overhead.

1.3.6.8 Note should be made here that the contractor states in the above referenced paragraph 10% as contractor's OH and profit for the item. The contractor's profit may be different for different items but normally the OH factor for head office as a percentage is generally a constant. So, it implies that the contractor's head office overhead factor is less than 10%

1.3.6.9 The parties give different dates for payments made.

1.3.6.10 The interest rate shall be as for other disputes as the arbitrator has decided

1.3.6.11 Interest calculation shall be for the difference in payments as there is a separate claim for delay in payments of IPCs in dispute 11 to avoid duplication ***of interest payment***

1.3.7 A). Arbitrator's decision

- 1.3.7.5 The claimant should be paid on the same basis as he has claimed [Bank invoice +10% overheads] + cost of interest at legal interest rate as the payments are beyond the original contract period
- 1.3.7.6 The calculation will be based on the data in SOC and SOD. Arbitrator will select data as he likes because the data by the two parties are not matching.
- 1.3.7.7 The amount due is 65,000/- LKR +16,400/-

1.3.8 B). Item P 5 - the temporary office for the contractor

B). Claimant's contention

- 1.3.8.5 As per contract the item should be paid 60% on completion of construction of the item and 30% proportionately for the contract period and 10% at the end of demolition and removal
- 1.3.8.6 The respondent refused to pay for the extended period
- 1.3.8.7 The claimant had been paid up to IPC 13 an amount of 123,000/= LKR and refused to pay after the contract period
- 1.3.8.8 The claimant should be paid the due amount for the full extended construction period + cost for delay in payment

1.3.9 B). Respondent's stand

- 1.3.9.5 The item P 5 is the temporary office for the contractor
- 1.3.9.6 The claimant is misleading stating this building as his work shop and stores
- 1.3.9.7 From 5th to 8th IPC, claimant was paid as he claimed. From 9th IPC the Engineer has recommended the amount previously paid, since the claimant has used his site office as stores and work shop, as in IPC13
- 1.3.9.8 Maintenance component was not paid after IPC 8, because it was used as stores

1.3.10 B). Arbitrator's reasoning

- 1.3.10.5 The building is the contractor's site office under item B5 for which the payment of 142, 000 .00 is made for construction and maintenance according to the mode C of preliminary notes in BOQ
- 1.3.10.6 The claimant stated in SOC, the payment is not made for the building used as stores and workshop, which is described under B6
- 1.3.10.7 The matter is not clearly presented by both the parties
- 1.3.10.8 The claimant is not presenting the issue clearly and the respondent interprets it as the claimant's effort of misleading

- 1.3.10.9 If the claimant used the building as the stores and work shop after IPC 8 as the respondent states, what was the contractor's office from that point is not explained by either party.
- 1.3.10.10 If the item P5 is used after the initial contract period, the claimant is entitled for the maintenance part during the approved extended period, whether as stores or office or both
- 1.3.10.11 Under further clarification, the claimant states the building was used till 01/08/x+1 and respondent states till 21/07/x+1 as stores. Thus, the arbitrator selects month of July as part i.e., average of 21 days as per respondent and 31 days as per the claimant to be $(21 + 31)/2 = 26$ days [leading to $26/30 = 87\%$]
- 1.3.10.12 So, the item being a monthly payment and 30% allowed for maintenance to be paid equally every month 30% /project period (15months) shall be paid up to 26th July x+1 only
- 1.3.10.13 Interest ***calculation shall be for the difference in payments as there is a separate claim for delay in payments of IPCs in dispute 11***

1.3.11 B) Arbitrator's decision

- 1.3.11.5 Pay for the use of the building for the extended contract period too i.e., from 08 May x to 26 July x+1. IPA & Paid Dates should be taken from submissions
- 1.3.11.6 Rate of interest for any payment done after the initial contract period, shall be legal interest rate
- 1.3.11.7 The amount due is 0.06 million LKR

1.3.12 C). Item P8 -engaging qualified staff

Claimant's contention

- 1.3.12.5 Respondent did not make any effort to pay the item B8, even though the required staff is engaged even during the original contract period
- 1.3.12.6 Daily attendance sheet was maintained at site. Engineer's representative took reference when they visited site
- 1.3.12.7 Attendance is in log book record; copies are in SOC; Attendance summary is in SOC
- 1.3.12.8 The amount deducted by respondent, should be paid to the claimant
- 1.3.12.9 The claimant is entitled for interest, for the period beyond initial contract period
- 1.3.12.10 Further clarification- Amount supposed to be paid in bill 13 is, 90,000/= LKR

1.3.13 C). Respondent's stand

- 1.3.13.5 The matter is discussed in dispute 2

- 1.3.13.6 The claimant is distorting facts stating payments are not made from IPC 1
- 1.3.13.7 Payments are made as per the clause 14.3 of COC
- 1.3.13.8 The amount payable under the item beyond the initial contract period too, is calculated and accommodated under dispute 13, as summary of the attendance and also comparative statement for the staff who was already nominated AND DETAILS SUBMITTED to the Engineer
- 1.3.13.9 The claimant **is not entitled** for interest for the period, beyond initial contract period

1.3.14 C). Arbitrator's reasoning

- 1.3.14.5 This matter has been dealt under dispute 2. So, under this dispute it has to be payment during extended period and the interest for it during the **extended period only**.
- 1.3.14.6 Accordingly, all payments made are acceptable
- 1.3.14.7 Any payment not made for not submitting attendance sheets shall be paid after receiving the support documents, if they are found correct with contemporary records; but no delay payment shall be considered and no interest shall be considered
- 1.3.14.8 Attendance summary is not disputed by the respondent as incorrect
- 1.3.14.9 All deductions made according to the special condition in contract data, is incorrect and should be paid back
- 1.3.14.10 Any payment due after the original contract period, if the staff is engaged and can be seen from contemporary records, shall also be paid
- 1.3.14.11 Any dues unpaid according to arbitrator's decision should be paid for the cost and interest at the given rate in contract, if attendance sheets are not given with bill [IPA].
- 1.3.14.12 Interest rate to be used after the initial contract period shall be at legal interest rate, considering the low interest rate agreed is for the contract period only and the actual cost of interest, if temporary overdraft is taken from a bank the interest rate is much higher.
- 1.3.14.13 Interest ***calculation shall be for the difference in payments as there is a separate claim for delay in payments of IPCs in dispute 11***

1.3.15 C). Arbitrator's decision

- 1.3.15.5 Pay for the engagement of staff if so done, after the initial contract period
- 1.3.15.6 Pay interest for all deductions to be paid back as per the decision in dispute 2, at legal interest for the period after initial contract period

- 1.3.15.7 Pay interest for all new payments made based on contemporary records submitted from the date of submission [dispute resolution process] at the contract agreed interest rate, if the period is 12 months or less even though paid afterwards because the reason is non- submission of support documents, which is contractor's fault

1.3.15.8 **The amount due is 0.06 million LKR**

1.3.16 D Item P13 - noise and dust control

D Claimant's contention

- 1.3.16.5 Contractor has stopped the work at council meeting times
- 1.3.16.6 Claimant has computed the cost caused due to interruption as 315, 000.00 for the extended period with interest shall be paid as compensation

1.3.17 D Respondent 's stand

- 1.3.17.5 This is explained under dispute 2
- 1.3.17.6 The claimant knew the need from the bidding time and everything about the need is recorded in the contract document in minutes of meetings

1.3.18 D Arbitrator's reasoning

- 1.3.18.5 The claimant knew the need from the start
- 1.3.18.6 The analysis for dispute 2 holds for this too. The subject matter shall be any payment not done after the approved extended period and cost of interest during that period
- 1.3.18.7 The claimant is not entitled for any payment for air/dust pollution control action
- 1.3.18.8 For noise pollution what can be done has been done by the contractor; what cost does he expends is immaterial, as it is under a bid item, for which the payment mode is also known
- 1.3.18.9 So, the payment has to be as per the contract during the period [months] of such interruption of work occurred and payment shall be on a monthly basis; whether during the initial contract period or approved extended period
- 1.3.18.10 The payment shall be 50% of item rate as only noise pollution is attended not the dust/air matter; i.e., $94,943.14 \times 50\% = 47,471$ /=LKR i.e., 47,471/= /15 is equal to 3,164/= per month for the full contract period and proportionately as provided
- 1.3.18.11 Any delayed payment shall be compensated with interest cost at legal interest rate for the period after the initial contract period

1.3.18.12 ***Interest calculation shall be for the difference in payments as there is a separate claim for delay in payments of IPCs in dispute 11***

1.3.19 D. Arbitrator's decision

1.3.19.5 As the payment matter has been decided under dispute 2, only the monthly amount not paid and interest shall be paid to the claimant for the period after initial contract period at legal interest rate.

1.3.19.6 **The amount due is 66,000 /= LKR**

1.4 Dispute 4 Additional overheads incurred during the period beyond the initial contract period

1.4.4 Claimant's contention

1.4.4.5 Contract period was extended due to delay in giving instructions for various items - -9 Nos. listed under a) to I) in SOC

1.4.4.6 Due to Covid-19, staff had to be maintained without doing any work

1.4.4.7 Due to Covid-19, material and labor shortages also caused delay

1.4.4.8 The basis for determining ex gratia EOT is incorrect

1.4.4.9 Further the bonds and insurances were extended

1.4.4.10 The claimant is entitled for any such Cost-plus reasonable profit, under sub clause 2.1

1.4.4.11 The claimant's profit and overhead factor is 35% in par with CIDA recommendation

1.4.4.12 Claimant used Hudson's formula to calculate HO overhead

1.4.4.13 Respondent approved EOT accepting the claimant's reasons for delay

1.4.4.14 Claimant seek compensation for 849 days as profit and overheads

1.4.4.15 In accordance with the standards adopted by the buildings department for the overhead component not absorbed by the preliminary items constitute 14.9+6.0 = 20.9 out of 25% [*reference is not given*]

1.4.4.16 The period from 04/05/x [original date of expected completion] to 31/08/x+2 is 849 days

1.4.4.17 "The respondent has failed to prove the claimant's delay. Hence the claimant has to be compensated for extended period". and "Claimant resorts his entitlement for additional overheads incurred during the extended period"

1.4.4.18 The claimant is entitled for interest payment as per sub clause 14 .7

1.4.4.19 In a later thought, the claimant requested permission to submit the audited financial statements of the company for the years during construction, which was received by the Arbitrator and on 17 August the claimant sent an e- copy and hardcopies are sent by post

1.4.5 Respondent 's stand

- 1.4.5.5 Claimant's arguments were defended by the respondent, in paragraph 10 of SOD under preamble with annexure.
- 1.4.5.6 Covid-19 situation is beyond the control of both parties.
- 1.4.5.7 Only time extension is requested up to 25/10/x; not the cost
- 1.4.5.8 Bond cost had been agreed to pay by the respondent [dispute 2]
- 1.4.5.9 The site office overhead can be compensated by recommending the preliminary items in accordance with the BOQ agreed payment mode.
- 1.4.5.10 The respondent agrees the same under dispute 3 and this was accommodated in the comparative statement.
- 1.4.5.11 The claimant is entitled to recover loss and expenses sustained, which had not been reimbursed by any other provision of COC during the extended period.
- 1.4.5.12 Head office overhead include, the rental of contractor's buildings and expenses on general support staff. If the claimant can prove the difference of these during and after initial contract period, it can be considered.
- 1.4.5.13 According to respondent's analysis, non-compensable delays exceeded compensable delays. The respondent took a new stand in rejoinder.
- 1.4.5.14 According to new analysis out of 850 days of total Extension 648 are the delays caused by the claimant in the above-mentioned tables.
- 1.4.5.15 The claimant did not ask for cost and if asked the EOT approval decisions would have been different.
- 1.4.5.16 The basis for determining ex gratia EOT is correct under delay in road works.
- 1.4.5.17 Festivals and power cuts also had been considered as reasons for EOT.
- 1.4.5.18 Extra work payment has been made with 26% overhead and profit which include HO overhead. Therefore, the extra work amount cannot be considered in the calculation of the revenue.
- 1.4.5.19 Audited statements are required to assess this extra HO component of overhead expenditure.
- 1.4.5.20 The respondent quoted from society of construction law publication "where Employer ***delay to the completion and the contractor delay to completion are concurrent and as a result of that delay, the contractor incurs additional costs, then the contractor should only recover compensation, if it is able to separate the additional costs caused by the Employer's delay from those caused by the contractor's delay. If it would have incurred the additional costs in any event as a result of the contractor delay, the contractor will not be entitled to recover those additional costs.***"
- 1.4.5.21 Even though the claimant's contract mismanagement is the ultimate reason for the delays caused in the project, the respondent intended to complete the

construction without disputes, by granting extensions in good faith. By granting extensions the respondent prevented the claimant from Liquidated damages of about 56 million.

1.4.5.22 Therefore, the claimant is not entitled for any compensation.

1.4.5.23 Prolongation cost shall be the ACTUAL COST.

1.4.5.24 Actual HO overhead component can be found from audited statements of the company.

1.4.5.25 Under respondent's issues, the respondent states that since the cost claim is not submitted by the claimant in the EOT request or thereafter; until dispute resolution time there was no dispute in existence to refer to adjudication or arbitration. The Engineer had no opportunity of determination.

1.4.5.26 Under respondent's issues, respondent showed that in the rejoinder when analyzing the delays by the claimant exceed the compensable delays.

1.4.6 Arbitrator's reasoning

1.4.6.5 For any project, profit and overhead factor is found from the rate analysis of key BOQ items collected at the bid time or after letter of acceptance together with the construction program and method statement

1.4.6.6 This has not been done in this contract at the start. That created the problem of agreeing new rates in deriving them from existing rates as per contract sub clause 12.3

1.4.6.7 According to submissions and proceedings 26% has been approved as profit and overhead factor. There is no reason to return back from this agreement just because dispute resolution has started.

1.4.6.8 Claimant's insistence the 35% as per some CIDA guideline has to be used, is of no meaning for a competitive bid situation. If so, the Employer can give a BOQ and ask the bidders who are willing to offer a suitable competitive discount and win the bid. These are meaningless arguments

1.4.6.9 Same logic as above holds for the respondent's insistence to use price fixing committee rates and BSR analysis. These are used when there is no other way to resolve situation but these should not be imposed on competitive bidders

1.4.6.10 As the contract has been administered without following the contract clauses seriously or the conditions are modified for whims and fancies of the persons who prepared the document, unwanted disputes have crept in to this contract; [example ceiling tiles]

1.4.6.11 'Profit and overheads' factor consists of anticipated profit which may vary from item to item, if the bidder so wishes or, in general a constant percentage overhead

- expected to cover by a particular contract + portion of site overhead uncovered in preliminaries, which are listed by the Employer and rates filled by the bidder.
- 1.4.6.12 As per the arbitrator's experience profit and overhead factor generally called as 'markup' varies in the range from 25% to 45 or 50%, depending on the competition, nature of work, cumbersomeness in operation, remoteness and accessibility problems, contractor's urgency to win a job, number of projects in hand and many such. So, no outside organization can fix the mark up for a contract and specifically it cannot be generalized as x%
- 1.4.6.13 Ref. SOC page 271, 2nd paragraph "Therefore the claimant is entitled for commission charges + 10% OH / profit factor along with the interest for the delay caused....". This is what the claimant requested under dispute 3 A for bonds and insurances.
- 1.4.6.14 For obtaining bonds the contractor has no site overhead as it is a job done by the head office. THUS, IT IS CLEAR THE HEAD OFFICE OVERHEAD IS ABOUT 10%
- 1.4.6.15 The 26 % had been approved for some items. The Engineer's correction is using price fixing committee rates which are not the market prices always. Therefore, the arbitrator does not wish to generalize that percentage for all determinations of OH & P factor. But this value is within the general range of mark up in the construction industry. Also, the contractor proposed 35% is in the same range. Thus, the Arbitrator proposes it is reasonable to arrive at a midpoint because the rate break ups have not been obtained at the beginning, before disputes could arise due to contract administration deficiencies. i.e. $(26 + 35) / 2 = 30.5\%$ say 30 % for easy division.
- 1.4.6.16 The claimant points out in SOC that the overhead uncovered by preliminaries is 20.9% of 25% according to buildings department standards. Say 21% for ease.
- 1.4.6.17 If the same basis is assumed and 30% markup is selected in place of 25%, the proportionate value shall be $21 \times 30 / 25 = 25.2$ say 25%. That will give a profit factor of 5% if 30% markup is selected and the uncovered site overhead if assumed 15%. The HO overhead factor is $25 - 15 = 10\%$. This is very close to the claimant's own request of profit and OH for bonds renewal as 10%.
- 1.4.6.18 The respondent's request for audited statement to assess head office overhead is logical, but practically very cumbersome as the number of projects the contractor was handling during initial contract period, during the extended period, value of work of these projects to be covered in each period etc. are unknown. Though the HO overhead can be found in that method, apportioning the cost to this project is also a question

1.4.6.19 However, the claimant/contractor submitted details prepared by Zion company for the past 3 years to assess head office overheads though he originally insisted to adopt **Hudson's formula for profit and overhead factor**

1.4.3.20.1 *Hudson's formula had been accepted in some case laws and in some, the use and the basis itself had been rejected. The formula is not a universally accepted one as the 'Manning's formula' in hydraulics. So, the arbitrator is not in support for the use of this formula, when a proper construction company can show from the audited statements, a more accurate value for HO component of Overhead, not covered in standard BOQ item costs due to extension.*

1.4.3.20.2 Further, Society of Civil Law publication SCL Delays and disruptions protocol 2nd edition Feb. 2017 in GUIDANCE PART C – Other Financial Heads of Claim under 2.10 states “The **use of Hudson's formula is not supported.** *This is because it is dependent on the adequacy or otherwise of the tender in question, and because the calculation is derived from a number which in itself contains an element of head office overhead and profit. So, there is double counting.*”

1.4.6.20 **The claimant has not made any cost claim or notice when the events occurred.** These are taken up during the dispute resolution process - Adjudication. So, the claimant has not supported his entitlement for interest during the initial construction/ contract period

1.4.6.21 The respondent's statements in rejoinder may be correct and genuine. But in contract administration, the Engineer has to be sharp. *The contractors in general are trustworthy, amicable, flexible, when they are in the receiving end. But, when the situation goes to a level such that their delays are covered, they are clever to talk law and rights and entitlements. This is a basic general truth for many contractors.* Even in this, the claimant stated proper analysis is not done by the Engineer for EOT based on proper techniques under claimant's reply in proceedings; but he made use of the EOTs approved.

1.4.6.22 It is seen in all EOT requests and approvals, the cause of delay, whose responsibility, requested and allowed EOT under each reason, overlapping situations etc. are not mentioned except in the last [ex-gratia] EOT approval, where the Engineer has listed the extension period under a few delay reasons. Even for this conclusion, the Employer has not shown his basis of assessment. Whatever is the reason for delay, delays in the critical path events only lead to overall time extension. But critical path has not been analyzed. The programs are not properly submitted and approved after analysis by the Engineer. This has given a great advantage to the claimant to claim compensation

- 1.4.6.23 The EOT approval letters are not technical and logical hence the contractor incurred site overhead has to be paid as per preliminary item payments; any uncovered portion has to be borne by the contractor, as he has not given notice of any cost claim at the time of EOT request
- 1.4.6.24 There has been no dispute about Engineer's determination because no determination can be made by the Engineer without a claim.
- 1.4.6.25 Even **till the hearings are concluded the claimant did not submit audited accounts TO MAKE USE OF THE OFFER BY THE RESPONDENT TO PAY THE ACTUAL OVERHEADS at claimant's head office.**
- 1.4.6.26 As the respondent points out, there was no dispute on payment of prolongation cost as the contractor has not made such request, when requesting and receiving EOT approvals. So, there is no dispute on cost for the adjudicator to consider as the Engineer not determined or not properly determined.
- 1.4.6.27 However, by the time arbitration started this matter has been an issue in adjudication and the construction contract was in progress [intermittently] and accepted by the Respondent /Employer without terminating the contract. So, the Arbitrator has to give decision on this, considering circumstances.
- 1.4.6.28 As explained by the arbitrator, only the Head office overhead component is the one to be compensated during the approved extended period. This too cannot be calculated correctly as referred in 1.4.2.16 & 1.4.3.14 above because records have not been maintained.
- 1.4.6.29 Under ex-gratia EOT the Engineer has clearly pointed out cost will not be paid. Hence HO overhead is not payable to the contractor for this period i.e., from 31/12/x+1 to the end.
- 1.4.6.30 Considering all matters and based on the fairness principle that a person providing a service has to be remunerated reasonably and when any contract is extended the contractor's HO overhead is not covered, the arbitrator is compelled to make an approximation only to pay for the relevant minimum period

1.4.7 Arbitrator's decision

- 1.4.7.5 Additional overhead cost shall BE CONSIDERED for the period from 04/05/x to 31/12/x+1 only as an approximate calculation based on a number of assumptions for the bill values paid from IPC13 to IPC 23 paid in Dec.x+1 as the next IPC is in March x+2. All additional payments and corrections allowed in the arbitration will not be considered for the value of work done in this period

- 1.4.7.6 There will be no interest considered as the claimant has not followed contractual requirements in sub clause 19.1
- 1.4.7.7 The **amount allowed is 4,978,233 /=-**; calculation assumptions and the workings are given separately

STAGE 2

1.5 Dispute 4

1.5.4 Claimant's contention II

- 1.5.4.5 Variations are executed in the extension period beyond 31/10/x+2
- 1.5.4.6 OH & P factor should be considered for the period
- 1.5.4.7 OH & P factor has to be adopted for the extended period for variations
- 1.5.4.8 As per sub clause 17.3. (g) any fault of the Employer is to be treated as Employer's risk and shall be a compensation event

1.5.5 Respondent's stand II

- 1.5.5.5 The claimant did not submit any cost claim or even give notice of a cost claim
- 1.5.5.6 Hence the Engineer could not give a determination.
- 1.5.5.7 When there is no determination made, there cannot be a dispute.
- 1.5.5.8 Any dispute can be referred for dispute resolution process. When there was no dispute there is nothing that can be referred to resolution
- 1.5.5.9 There is no dispute on prolongation cost in summary

1.5.6 **Arbitrator's reasoning**

- 1.5.6.5 Arbitrator's reasoning for stage 1 holds good for stage 2 also
- 1.5.6.6 The arbitrator has decided the time extension shall be for road work and canteen block works only as the building had been occupied before the expiration of the ex-gratia extension date
- 1.5.6.7 As instructions had been issued and the work has been carried out though late, the contractor should be allowed reasonable time from the date of instruction. These dates are determined by the arbitrator.
- 1.5.6.8 So, the HO component of overhead has to be paid to the contractor/claimant proportionately for the road work up to 31/01/x+3 and for canteen work to 21/02/x+3
- 1.5.6.9 As per stage 1 reasoning by the arbitrator 11.95% of value of work [ref. excel calculation sheet not attached here] done, from 31/12/x+1 to 31/01 /x+3 for road

works and from 31/12/x+1 to 21/02/x+3 for canteen work will be recommended as Uncovered OH component of the main office.

1.5.6.10 Parties have not given these values for stage 2 after IPC 25

1.5.6.11 So, the certified value of work in SAC or the IPC before it was requested as further clarification by the arbitrator vide letter No. 46 dated 09.12.x+3

1.5.6.11.1 In response, parties sent by email their values as in IPC 28. The value for road work is given by both parties nearly equal as 10,796,991/=. The claimant has additionally sent a certified document by the Engineer for curbs as materials at site for a value of 1,392,800 /=. But the value for canteen work is different and they are 3,826,600 /= by the Respondent and 3,135,700 /= by the claimant

1.5.6.11.2 The arbitrator considers these amounts are the contractor's income from the project due to the Employer's delays in instruction as reasoned out above

1.5.6.11.3 Hence HO overhead due to this work will be calculated as done for issues in stage one on the same dispute

1.5.7 Arbitrator's decision

1.5.7.5 Allow HO overhead component of 11.95 % as calculated for stage 1 issues, for the sum of 10,796,900/- +1,392,800.00/- +3,826,600/- = 16,016,400/= Therefore, at 11.95% **the allowable amount is 1,913,900/=**

1.6 Dispute 5- Compensation as a result of deleting / omitting major items of work 1.51

1.6.4 Claimant's contention

1.6.4.5 The provisional sum clause No.13.4 does allow the Engineer to instruct whole or part of the item; **Not to delete the whole item**

1.6.4.6 At the progress review meeting held on 23 /January/ x an issue was raised by the Engineer "PS items relevant to conference hall shall be deleted in this contract". But PS items coming under the conference hall were not mentioned.

1.6.4.7 At the next progress review meeting on 7 /February/ x, it was recorded that the item relevant to conference hall was deleted as per agreement of all parties at the last progress review meeting and there was no agreement in the previous meeting and this is unilateral recording in minutes without claimant's consent

1.6.4.8 Item that had been deleted amounts to 9.6 million LKR about 26% of the PS items in the contract

1.6.4.9 The claimant has spent including this for performance bond and insurance etc. and the anticipated profit is also lost

1.6.4.10 The Loss of profit is 3,360,000 /= LKR; interest from the effected date is 1,809,907/=

- 1.6.4.11 This work had been handed over to a 3rd party for execution which is contractually irregular and improper. So, the claimant is entitled for compensation.
- 1.6.4.12 The entire works in the mezzanine floor was not handed over to the contractor. Respondent is compelled to pay compensation to the claimant under sub clause 12.4
- 1.6.4.13 Loss of overhead and profit is 1, 462,540 /= and the interest claim for this is 709,845 /= LKR.
- 1.6.4.14 In response to arbitrator's request for any support document of disagreement for the omission of a part of the building, the claimant has not been able to provide such document.

1.6.5 Respondent 's stand

- 1.6.5.5 Bonds and insurances costs are paid to the contractor under relevant preliminary items and hence there is no loss to the claimant
- 1.6.5.6 Drawings, instruction or whatever has not been issued to the contractor from the beginning regarding conference hall. Thus, the claimant cannot spend on that item for any preparatory work such as product research etc.
- 1.6.5.7 If minutes of meetings are correct, then the contractor's statement is incorrect. The contractor has not raised any objection in writing even later, if the minutes are not correct.
- 1.6.5.8 The claimant's argument that the whole PS item cannot be removed without using is not accepted.
- 1.6.5.9 Extra works worth of 4.16 million has been ordered, this too has to be considered when calculating loss of scope
- 1.6.5.10 The dispute is not as giving eligibility for any amount due.
- 1.6.5.11 In response to arbitrator's request for any support document of agreement for the omission of a part of the building the respondent has not been able to provide such additional document other than the minutes of meetings referred to in submissions

1.6.6 **Arbitrator's reasoning**

1.6.6.1 A. Deleting work and handing over to a 3rd party

- 1.6.6.1.1 The Engineer has authority to omit work; whether PS or BOQ items --ref. sub clause 12.4
- 1.6.6.1.2 Though an omission order is not given as the claimant points out it is virtually an omission of work scope
- 1.6.6.1.3 The contractor should make his claim at the time of event
- 1.6.6.1.4 The contractor's claims are to be made following the procedure in sub clause 19.1

- 1.6.6.1.5 The claimant's grouse is that this work had been handed over to a 3rd party **for execution which is contractually irregular and improper. So, the claimant is entitled for compensation as** he lost expected work and hence lost his expected profit
- 1.6.6.1.6 The Claimant / contractor's allegation that the deleted work is given to another party is a serious one, if done without the agreement of the claimant/contractor. However, the respondent shows agreement of parties in minutes of meeting, which has not been challenged by the claimant during the construction time. Agreement reached has not been disproved by the claimant in the submissions or in proceedings other than the claimant's unsupported statements
- 1.6.6.1.7 On request for further clarification by the arbitrator on this matter, neither party could give any written proof for the contractor agreeing or disagreeing on the deletion and giving the same work to another party; except for the minutes of meeting not signed by the parties or confirmed as correct in the following meeting. But this has been the practice in this contract administration, for which also there is no disagreement or a change made by the parties in a latter period either
- 1.6.6.1.8 The contractor not making any protest in writing amounts to tacit acceptance [acquiescence in legal terms] or reluctant acceptance [acquiesce in legal terms] during the contract period. **The issue had been taken only in dispute resolution stage. So, it cannot be considered.**
- 1.6.6.2 B. Loss of scope
- 1.6.6.2.1 It is very correct that a contractor who comes to do some work if not allowed to do full scope, will not be able to cover his overheads and earn his profit as expected
- 1.6.6.2.2 Also, the contractor knows from the beginning the BOQ is approximate and likely to be less or more when the work is completed and omission orders and extra work orders are likely to be ordered by the Engineer, as per the relevant conditions of contract. Provisional sum items are money provisions in contracts for the Employer to decide in a later stage, if the work expected is not fully decided by the Employer at the time of calling for bids. In this contract entire floor to be given as a P sum item is not very clear.
- 1.6.6.2.3 The contract sub clause 12.3 a) indicates an item quantity changed by more than 25% and the cost by 1% for any item new rates can be proposed. This is also an indication the cost of the works is variable. Therefore, loss of scope cost shall be decided only after the Statement At Completion [SAC] is

prepared to assess whether there is a substantial change in the total values of works, such that the overheads are not covered and the anticipated profit is lost.

1.6.6.2.4 So, this situation is based on a condition, the effect of which can be assessed when the project is completed only. This claim situation can be assessed at the time of statement at completion only, whether the contractor's overheads are covered or not covered.

1.6.6.2.5 It is seen in IPC 25, LKR 126 million is certified. So, when the SAC is submitted with road work payments it is very likely to be close to the initial contract sum within 25% difference.

1.6.6.2.6 The amounts due in IPC 28 as given by the parties, as clarifications on arbitrator's request are, 16,016,451 /= for road and canteen remaining work alone [ref. decision for dispute 4 stage 2], Therefore, the total value being over 142 million, the situation is not something much different from what the contractor could expect at the time of bid.

1.6.7 Arbitrator's decision

1.6.7.1 The loss of profit and overhead claim is REJECTED

1.7 Dispute 6 - Refusal to accept the revision of rate submitted over change in specification of contract item J1

1.7.6 Claimant's contention

1.7.6.1 According to BOQ the ceiling has to be supplied and fixed as per item J1, J2 and 2G1 & 2G2.

1.7.6.2 Accordingly, claimant supplied the sample for Engineer's approval.

1.7.6.3 Supplier on inquiry said 02 months are needed for importing.

1.7.6.4 The supplier informed that there is going to be a price increase.

1.7.6.5 The contractor therefore looked for an alternative.

1.7.6.6 The claimant submitted another sample from another supplier and the Engineer did not approve the second sample and took nearly 04 months to give a decision.

1.7.6.7 After another 04 months, the Engineer rejected the 2nd sample saying it does not match with the existing ceiling; not for any technical reason. Therefore, this shall be considered a variation from the BOQ description.

1.7.6.8 The Engineer gave instruction in writing to use Daiken brand ceiling and purchase them from JC Enterprises. This is a conditional offer. It has to be treated as variation.

1.7.6.9 The claimant should be compensated for the additional cost incurred. Claimant submits a rate breakdown for ceiling

- 1.7.6.10 "What is 'Minimum price' is not defined in the contract.
- 1.7.6.11 The ceiling item is a competitive price item.
- 1.7.6.12 The item description has an ambiguity [ref proceedings issues of claimant]
- 1.7.6.13 Respondent never rejected the 2nd sample on any technical reason as in claimant's reply in proceedings under issues of claimant.
- 1.7.6.14 The Engineer requested the ceiling to match with the existing one, which is a change from BOQ description and hence it is an instruction for a variation.
- 1.7.6.15 CE approved vide letter dated 04/07/x-1 "DAIKEN COORDINATE 20 ASTRAL" which is different from the BOQ description.

1.7.7 Respondent 's stand

- 1.7.7.1 The work description (specification) of the ceiling work has been clearly specified with prime cost of a sheet and the size 600 x600 mm.
- 1.7.7.2 The claimant has stated totally fabricated untrue details in SOC on this matter.
- 1.7.7.3 Claimant has sought approval for the item, through his letter dated 25/05/x-1
- 1.7.7.4 The Engineer requested clarification vide letter date 30/05/x-1.
- 1.7.7.5 Claimant's submitted technical literature for Daiken ceiling by letter dated 23/06/x-1.
- 1.7.7.6 The Engineer approved ceiling sheet according to claimant's request on 04/07/x-1.
- 1.7.7.7 Claimant requested approval for another brand on 24/07 /x-1 without giving reason for the change.
- 1.7.7.8 The Engineer sought clarification and expressed justification of inability to approve the sample submitted
- 1.7.7.9 Claimant submitted details of "OW Acoustic mineral fiber ceiling" vide letter dated 03/08/x-1.
- 1.7.7.10 Claimant on 10/08/x-1 wrote on delay in approvals stating previously approved brand cannot be supplied by the supplier and country of origin was not given by the supplier.
- 1.7.7.11 The Engineer confirmed with the supplier originally given by the claimant and confirmed availability and found the country of origin of the product and gave **approval vide letter dated 13/09/x-1.**
- 1.7.7.12 The claimant has stated in SOC page 359 paragraph 'g', that the first brand is cheaper than the second. But in paragraph 'f', he states a loss due to approval of first sample.
- 1.7.7.13 The material was brought to site on 21/03/x.

- 1.7.7.14 The claimant purchased a sheet at 1150/- LKR Thus he had no loss because the BOQ description is to purchase at minimum 1200 LKR.
- 1.7.7.15 The claimant is paid at BOQ rate under issues by the respondent and reply of both parties.
- 1.7.7.16 The respondent insists again that the claimant is entitled to be charged with a counter claim as per SOD submitted by the respondent.

1.7.8 Arbitrator's reasoning

- 1.7.8.1 The item description is unclear; it states of "supply and fixing 600 x600 mm grid size suspended ceiling using 20 triple step sandy/triple step sandy ceiling sheet eqt. Rate to include for cross Teeto suspend the framework. (Minimum price of a 600 x600 mm ceiling sheet excluding VAT Rs. 1200.00)"
- 1.7.8.2 From the submissions and proceedings, it is clear the intension of the employer was to have a similar appearance in the ceiling as in the existing ceiling in finished section of the building.
- 1.7.8.3 By trying to give a technical specification and a price in the item description, it has become meaningless. It has gone worse by adding a word "minimum". Which employer will ask for a higher price than a minimum is not understandable!
- 1.7.8.4 The dispute has been originated by this wrong description of BOQ item.
- 1.7.8.5 The Engineer has accepted the first sample submitted.
- 1.7.8.6 But the contractor's submission of a second sample or even more shall not be wrong. The Engineer's responsibility is to approve one of them or reject all if he has reasons to do so, clearly indicating the reasons.
- 1.7.8.7 In this instance, it has not happened from the Engineer.
- 1.7.8.8 Contractor has been vague in his statements in the submissions.
- 1.7.8.9 The Engineer has approved the first submitted sample of the claimant after some months. The contractor too has contributed to this by making different statements
- 1.7.8.10 The item is a competitive bid price item. Both parties agreed of it in issues of claimant in the proceedings
- 1.7.8.11 It is revealed that the finally used material approved by the Engineer, is not exactly matching with the BOQ description.
- 1.7.8.12 The Engineer has not insisted on a particular brand NOT submitted by the contractor. Hence it is the contractor's choice not an instruction to change.
- 1.7.8.13 But the process has delayed the work and purchasing. However, there is no mention of a price change situation other than the normal price escalation paid under the contract in general.

- 1.7.8.14 The round and round approval and submission process only created delay. However, time extension has been granted to cover this period on other reasons up to 31/08/x+1.
- 1.7.8.15 Had the Engineer approved a sample by directing the contractor to submit a specific brand the contractor's stand that a variation is created by approving a sample different from or not matching exactly with the BOQ description WOULD HAVE CREATED SITUATION OF A VARIATION.
- 1.7.8.16 The approval letter dated 13/09/x paragraph 2 "we had made clarifications with the suppliers of 1st and 2nd sample material and came to conclusion of approving the known material which were used in previous stages. Therefore, you are requested to bring the material as approved earlier. The earlier approval is letter dated 04/07/x which states in paragraph one "Your forwarded electronic mails indicate that "ceiling exposed Tee bar suspension system" belongs to 'Framework' brand and suspended ceilings belong to Daiken ceilings will be supplied to you by JC enterprises" In paragraph two, it is given "It is recommended to use **Daiken coordinate 20 astral** for the works
- 1.7.8.17 Had this Daiken coordinate 20 astral was not the same given in the contractor's submitted literature, it amounts to a variation. IT IS SEEN IN CONTRACTOR'S SUBMISSION LETTER DATED 23/06/ x-1 ANNEXURE I OF SOC PAGE 365 ATTACHED LITERATURE PAGE 372 IN THE 6th ROW GIVES 5/8 "coordinate 20 Astral". So, the Engineer recommended use of the same type proposed by the contractor and hence no new specification is introduced.
- 1.7.8.18 In further clarifications submitted by the Respondent dated 04/05/x+3,
- 1.7.8.18.1 Annex F50 letter dated 25/03/x the contractor/claimant proposed use of 20 CONSTELLATION, which has been informed as technically equivalent to **coordinate 20 astral** which was originally proposed by the contractor/claimant. This has been explained at the progress review meeting on 07/03/x.
- 1.7.8.18.2 This has been confirmed by the supplier JC Enterprises vide letter dated 18/03/x in item 2 of the letter.
- 1.7.8.18.3 PD has approved on condition that assurance be made to match specification requirements vide letter NP/23/01/01/01/01-01(x) dated 26/03/x.
- 1.7.8.19 Thus, **it is NOT a variation and NO new rate shall be applicable**

1.7.9 Arbitrator's decision

1.7.9.1 THE CLAIM IS REJECTED

1.8 Dispute 7 - Payment reduction of extra works as a result of Engineer not being able to finalize the payment in the stipulated time in the contract [ESR ...Nos.]

1.8.6 Claimant's contention

- 1.8.6.1 Extra works were instructed verbally; the contractor carried them out and claimed in interim payment applications [IPA]
- 1.8.6.2 The Engineer considered them as ordered extra works and certified these payments.
- 1.8.6.3 Other than this, there is no extra works order issuing practice during the contract period.
- 1.8.6.4 The contractor submitted extra works were paid at 50% in IPC and corrected in different ways in different IPC and finalized in IPC [Bill] No 18.
- 1.8.6.5 In SOD a totally different correction is given.
- 1.8.6.6 For material prices the respondent has collected rates from market by collecting quotations. These may include discounts too.
- 1.8.6.7 Discounted prices shall not be used in cost assessment and the analysis of respondent is irregular and wrong.
- 1.8.6.8 The respondent used wrong values for labor cost and unrealistic percentage for profits and overheads.
- 1.8.6.9 A proper rates analysis has been given in SOC page 409 to 436.
- 1.8.6.10 ESR 1 to 18 were claimed from IPA [bill] No.5 to 17; but paid only 50% of certified amount not 50% of claimed amount
- 1.8.6.11 The respondent has corrected again whole 18 ESR and another 36 in SOD during adjudication process.
- 1.8.6.12 Deducted amounts were released in IPC 18 for which payments were made on 01/11/x.
- 1.8.6.13 The claimant claims interest for this delay in payment amounting to 1,379,877/= LKR.

1.8.7 Respondent's stand

- 1.8.7.1 Engineer obtained quotations from the market to assess the rates given for materials.
- 1.8.7.2 The Engineer used district price fixing committee rates for labor as per sub clause 12.3.c.
- 1.8.7.3 The claimant had delayed to submit profit and overhead factor until 26/06/x+1.
- 1.8.7.4 The respondent has prepared a comparative statement and annexed in this SOD as per contract clause 14.5

- 1.8.7.5 The quotations for material prices and the district price fixing committee rates for labor are given in annex G 3 to G 25.
- 1.8.7.6 'Profit and OH' factor breakdown is given in G26 & G27.
- 1.8.7.7 Since the preliminaries in BOQ already contains components of OH & P and the same were used for extra works performed by the claimant too, obtaining rate breakup is essential to avoid duplication of payments by the Engineer.
- 1.8.7.8 The proposed 35% has been corrected to 26% by considering preliminaries and other components already included in BOQ.
- 1.8.7.9 The compensation claim is prepared on this regard and is given in table 8 under dispute 13.
- 1.8.7.10 Claimant submitted ESR at different stages are as given in page 237 of SOD under a) to k) for 37 numbers in IPA Nos. 4, 5, 8, 12, 13, 14,16,19,20, 21, and in 25.
- 1.8.7.11 Respondent rejects the way the ESR calculation done by the claimant.
- 1.8.7.12 Engineer approved extra rates are given in annex G28 to G56.
- 1.8.7.13 The respondent expects the arbitrator to decide on these **rates to resolve this dispute**

1.8.8 Arbitrator's reasoning

- 1.8.8.1 The main reason for this is, shortcoming in bid document and contract administration at the initial stages. If some key item rate breakups were to be given by the successful bidder before starting construction this disagreement on profit and overhead factor would not have arisen.
- 1.8.8.2 Ordering extra works without negotiating rates is wrong contract administration. Before actual physical work is started rates should be agreed. The contract clause 13.1 allows the Engineer to instruct or request to submit a proposal for initiating a variation. "The contractor shall not make any variation and /or modification of the permanent works, unless and until the Engineer instructs or approves a variation". Also sub clause 3.3 states in the last sentence "These instructions shall be given in writing". **It is apparent here that the contract administration is totally INCORRECT**
- 1.8.8.3 The condition to use district price fixing committee rates for labor and plant is unfair in a competitive bidding situation. If it is correct then the bids can be given with Engineer decided item rates based on price committee rates for all works and request the bidders to add their mark up and submit the bid and select the lowest capable [= Contractors with good past performance record found from ICTAD registration record] bidder.
- 1.8.8.4 When such conditions are imposed the bidders cannot avoid but agree. Most bidders need a next project to keep the organization functioning. So, the bidders

agree but it is not a willing acceptance though the Employer can say the bidder agreed. But under the unfair contract terms act, it cannot be called unlawful as the parties have knowingly agreed because submitting a bid is a voluntary act.

- 1.8.8.5 At the time of bidding the bidder expects the contract to be completed in the agreed period, so that agreed unfavorable condition is also expected to be borne by the contractor only during that period.
- 1.8.8.6 Therefore, the arbitrator considers this sub clause 12.3.c. shall be applicable to extra works given during the original agreed contract period only. So, all extra works ordered after the original period, the rates for labor and plant has to be as claimed by the claimant should be given consideration.
- 1.8.8.7 Engineer collecting quotations to compare and see the material prices quoted by the contractor is justified. But imposing the same on the contractor is unfair. The rates may differ at places at times and the person's acceptance to the one who offers quotations. The correct way is to have the quotations and call the contractor to compare with quotation prices and to negotiate for a reasonable value. If the contractor is adamant the Engineer can use the determination clause and take his own decision. Such action is not seen from the submissions or in proceedings in this contract.
- 1.8.8.8 UNDER DISPUTE 7, RESPONDENT'S ISSUES NO.192, BOTH PARTIES REQUESTED FOR DECIDING RATES FOR 'ESR' BY THE ARBITRATOR.
- 1.8.8.9 In this situation as an approximation to resolve the dead lock the arbitrator will take the average of the claimant proposed material price and the Engineer decided material price for work ordered after the initial contract period
- 1.8.8.10 Arbitrator fixes the OH & P factor as 30% as an acceptable practical value as reasoned out under 5.4.3 above in dispute 4 for extra works ordered after the initial contract period.
- 1.8.8.11 In further clarifications the respondent's stand that there is no room to calculate financial charges individually for each item in contract under sub clause 14.7 is unfair. If the parties agree for the arbitrator to fix a rate, the rate is valid for the work done under that rate. If the particular item is claimed and the Engineer certified less the contractor's due money had been held up unreasonably until the arbitral award, such payment of interest as per contract clause cannot be challenged. This calculation is tedious but in fairness it has to be made and the amount may not be substantial for a particular single item.
- 1.8.8.12 As reasoned out in other disputes the interest rate will be the one as per contract for payments during the initial contract period and at legal rate for periods after the initial contract period.

1.8.8.13 *Interest calculation shall be for the difference in payments only, as there is a separate claim for delay in payments of IPCs in dispute 11*

1.8.9 Arbitrator's decision

1.8.9.1 The arbitrator will finalize all ESR rates based on the above reasoning in 1.7.3.8
Interest will be paid for the difference unpaid as in 1.7.3.12 and 1.7.3.13 above

1.8.9.2 The amount due is 2,336,857/= LKR

1.9 Dispute 8 - Provisional sum payments are not satisfactory for item No. V. speaker system, No. VI a, telephone PABX system No. VI b, Data Batch Panel, No VIII CCTV

1.9.6 Claimant's contention

1.9.6.1 Items involved are, Speaker system [No V], Telephone PABX system [No VI a], Data batch panel [No.VI b], CCTV system [No. VIII]

1.9.6.2 Rate analysis for provisional items is annexed [SOC]

1.9.6.3 In Bill No. 19 [IPA 19] P. sum amount was reduced from 8,843,039/= to 4,396,451/= LKR unreasonably [SOC]

1.9.6.4 In Bill No. 20 [IPA 20] P. sum amount was reduced from 8,843,039 /= to 4,659,507 /= LKR unreasonably [SOC]

1.9.6.5 In Bill No. 21 [IPA 21] P. sum amount was reduced from 8,843,039 /= to 4,785,003 /= LKR unreasonably [SOC]

1.9.6.6 In Bill No. 22 [IPA 22] P. sum amount was reduced from 8,843,039 /= to 5,173,586 /= LKR unreasonably [SOC]

1.9.6.7 In Bill No. 23 [IPA 23] an amount was reduced from 12,252,505 /= to 7,336,124 /= LKR unreasonably [SOC]

1.9.6.8 Labor quantity reduced without reason; material prices replaced by respondent collected quotations; OH & P factor reduced to 10% and quantity for electrical items were reduced for no reason [SOC]

1.9.6.9 There was no communication on these rates until SOD was submitted on 30/09/x+1.

1.9.6.10 This OH&P factor has been changed to 10%, 16% and 26% at different times and for different items [SOC]

1.9.6.11 The claimant has requested 35% OH&P factor for extra works [SOC]

1.9.6.12 As a result, the claimant has lost 5,071,069 /= LKR and interest for this shall be 1,125,443/= LKR [SOC]

1.9.6.13 The claimant submitted invoices from E city in bill [IPA] 19 under Claimant's issues in proceedings

- 1.9.6.14 Are there reasonable grounds to consider that, E city prepared purposefully improper invoice and ASTP Company did not prepare purposefully improper letters under Claimant's issues in proceedings?
- 1.9.6.15 Respondent failed to follow sub clause 13.4 correctly in Respondent's issues in proceedings.
- 1.9.6.16 The claimant disagrees with the comparative statement prepared by the respondent for the arbitration, to settle the differences in payments under Respondent's issues in proceedings

1.9.7 Respondent's stand

- 1.9.7.1 The Engineer obtained quotations to verify the rates quoted by the claimant.
- 1.9.7.2 The Engineer used price fixing committee rates for labor as per clause 12.3. (c) [SOD]
- 1.9.7.3 The claimant submitted invoices from E city Networks and Telecommunications [SOD]
- 1.9.7.4 Actual supplier ASTP informed the respondent that the claimant failed to pay him by letters dated 03/02/x+1 and 19 /06/x+3 [SOD]
- 1.9.7.5 ASTP disclosed the claimant pressurized to give false figures in invoice and did not pay him after collecting payments from the Employer
- 1.9.7.6 This is an attempt of unjust enrichment and amount to providing false documents
- 1.9.7.7 The respondent paid the claimant after checking actual supplier's invoices. [SOD]
- 1.9.7.8 Respondent has annexed quotations too. [SOD]
- 1.9.7.9 The items- a, b, c, d, & e are reduced because of these corrections. [SOD]
- 1.9.7.10 The respondent letter to ASTP shows that they have supplied the items and claimant requests warranty cards from ASTP - Respondent's production of a document under claimant's issues in proceedings.
- 1.9.7.11 Table 1 in SOD page 7 shows delays of IPC payments, under respondent's issues in proceedings.
- 1.9.7.12 There are separate claims for mobilization advance deductions and lift payment issues. All others are accommodated in comparative statement. These may be further modified in arbitral decision.
- 1.9.7.13 Mobilization advance has not been managed properly by the claimant.
- 1.9.7.14 Signatures in E city and ASTP invoices are similar under respondent's issues in proceedings.
- 1.9.7.15 Regarding the correct supplier please refer to Z 5 of admissions and issues of respondent and annex.

- 1.9.7.16 Preliminaries were paid during extended period given in respondent's issues in proceedings.
- 1.9.7.17 There are over payments and under payments in IPCs. Comparative statement was prepared to correct these and compensate the claimant's true losses. These calculations may be adjusted in the arbitration.

1.9.8 Arbitrator's reasoning

- 1.9.8.1 It is very clear that the dispute has arisen because of wrong contract administration.
- 1.9.8.2 Provisional sum items should be instructed by the Engineer. Though there are items in BOQ, the contractor cannot start them without the Engineer's instructions.
- 1.9.8.3 The statement that the instructions were mostly verbal and log book was the only contemporary site record, was not disproved by the respondent.
- 1.9.8.4 The item should be described clearly to the contractor and contractor's quoted rate should be obtained by the Engineer and may be verified with own quotations, collected independently by the Engineer. But the Engineer should have negotiated and failing only should have determined the final rate on his own, if negotiations failed. [ref. sub clause 13.4 a. and 13.3 of COC]
- 1.9.8.5 The sub clause 13.4.b. for overhead factor or profit and overhead factor as "a %" to be fixed by the contract in particular conditions cannot be disagreed if it had been in the contract conditions.
- 1.9.8.6 The general clause allows a percentage to be given in contract data for overhead charges and profit for provisional sum items. But the contract data states "13.4.b. - percentage for adjustment of provisional sums 10%"
- 1.9.8.7 So, the contract data is not matching with the general clause and the contractor has got a chance to ask for a different percentage for overhead charge and profit. THEREFORE APPLYING 10% AS PROFIT AND OVERHEAD FACTOR IS WRONG.
- 1.9.8.8 The material price quotation for ASTP supplied items, are decided based on the documents submitted by the parties [PS items No. V -speaker system, No.VI- a PABX and data batch VI b Data batch panel No. VIII – CCTV]
- 1.9.8.9 In reply to SOD PS I, PS IX and PS XIII are mentioned. PS. IX and ESR 17 item descriptions are same. But ESR analyses are not found in any submission for all PS items other than V, VI a, VI b, VII and IX. So new rate determination done as for extra/additional works cannot be done by the arbitrator for all PS I & XIII items in the same manner as for extra works.

1.9.8.10 Regarding a similar situation of disagreement on the Engineer's determination of new rates under ESR the arbitrator has reasoned out under dispute 7 and dispute 4. The same principle will be applied here too by the arbitrator to resolve the deadlock created by wrong contract administration and wrong contract data under 14.3.b

1.9.8.11 Interest ***calculation shall be for the difference in payments as there is a separate claim for delay in payments of IPCs in dispute 11.***

1.9.9 Arbitrator's decision

1.9.9.1 The arbitrator will decide rates.

1.9.9.2 Depending on the difference in rates the amounts due will be decided.

1.9.9.3 Amount of interest will be decided accordingly for work instructed / started during the initial contract period and for those started after the original date of completion, at agreed interest rate and at legal interest rates respectively.

1.9.9.4 **The amount due is 1,978,947/= LKR**

1.10 Dispute 9 - Reduction for mobilization advance recovery from the extra scheduled works and provisional sum items

1.10.6 Claimant's contention

1.10.6.1 Recovery of mobilization advance from the payments for provisional sum and additional work is, contrary to the contract conditions, because mobilization advance was not calculated considering these items.

1.10.6.2 Mobilization advance was paid as per sub clause 14.2 of COC i.e., the amount for provisional sums is deducted from contract sum.

1.10.6.3 In recovering the mobilization advance, the total value of IPC including provisional sums and additional works, were considered by the respondent for calculation.

1.10.6.4 Sub clause 14.2 states, "b) Advance payment shall be repaid by deducting proportionate amounts from the interim payments. Advance payment shall be repaid in full, when the total certified value of Works reaches 90% of the initial contract price less provisional sums".

1.10.6.5 Claimant has written several letters [SOC]

1.10.6.6 Respondent has returned a sum of 2,425,204 /= LKR in IPC 22 on 27/11/x+1 [SOC]

- 1.10.6.7 Contract stipulates deductions to be proportionate to work done; the respondent has used 22.22 % fixed rate for deduction [SOD]
- 1.10.6.7.1 The rate of advance payment recovery shall be 22.22%.
- 1.10.6.8 Therefore, the claimant makes an interest claim of 1,007,719 /= LKR for this wrong deduction causing cash flow problems.

1.10.7 Respondent 's stand

- 1.10.7.1 In the sub clause 14.2.b) there are two sentences. First sentence says how the advance has to be repaid. Second sentence says when to recover the advance in full.
- 1.10.7.2 Hence the recovery is correct. The value of Works means all the Work done whether under BOQ or as additional works or provisional sums.
- 1.10.7.3 The word Works is defined in contract conditions.
- 1.10.7.4 The claim is not acceptable. Respondent has clearly expressed his views in SOD under dispute 9.
- 1.10.7.5 The rate of advance payment recovery shall be 22.22%

1.10.8 **Arbitrator's reasoning**

- 1.10.8.1 The claim is baseless as the claimant has mixed up two separate sentences and added the phrase 'less provisional sums' in the second sentence to the first sentence
- 1.10.8.2 There is no error in recovery, as the interim payment value is considered correctly
- 1.10.8.3 The contract data does not say anything on advance recovery.
- 1.10.8.4 The respondent is silent on the statement that 2.4 million was repaid in IPC 22 on 27/11/x+1
- 1.10.8.5 **Neither party took this matter of repayment in their issues and did not discuss under the proceedings. Therefore, the arbitrator disregards this statement of repayment**

1.10.9 **Arbitrator's decision**

- 1.10.9.1 **The claim is dismissed and there is no right for interest**

1.11 **Dispute 10-- imposing Liquidated Damages Wrongly and subsequent reimbursement without compensation**

1.11.6 Claimant's contention

- 1.11.6.1 An amount of 1,737,600/= has been deducted as LD in IPC 19 [bill 19] received on 09/12/x
- 1.11.6.2 As EOT entitlement was accepted / EOT approved the LD deduction is wrong and was subsequently released on 10/03/x+1 [SOC]
- 1.11.6.3 The claimant is entitled for interest 42,476/= LKR [SOC]
- 1.11.6.4 When Bill 19 was certified on 31/01/x+1. 2nd EOT request dated 25/10/x was received by the Engineer on 29/01/x+1. The payment for IPC19 was received on 05/03/x+1.
- 1.11.6.5 The Engineer took 37 days to finalize the EOT approval.

1.11.7 Respondent's stand

- 1.11.7.1 Respondent admits that an amount of 1,737,691/= has been deducted as LD in IPC 19 [bill 19] received on 09/12/x.
- 1.11.7.2 The payment was made on 05/03/x+1.
- 1.11.7.3 First EOT request dated 02/05/x was received on 17/05/x, requesting EOT up to 31/10/x.
- 1.11.7.4 First EOT was granted to 25/10/x - page 82 of SOD.
- 1.11.7.5 Second EOT was received in PD's office on 29/01/x+1, dated as 25/10/x.
- 1.11.7.6 In the absence of EOT approval, LD was deducted. EOT approval delay was because the EOT request was received in next year with 25/10/x as date. The claimant has back dated the letter.
- 1.11.7.7 The claim is rejected. The respondent has clearly elaborated in SOD under dispute 10.

1.11.8 Arbitrator's reasoning

- 1.11.8.1 Any deduction done has been repaid means that the deduction was wrong.
- 1.11.8.2 Hence the right for interest cannot be denied.
- 1.11.8.3 LD can be imposed when the Employer likes, even though the entitlement to impose is there. Circumstances can change. Hence LD imposition need not be done hurriedly. At the time of [SAC] Statement at Completion, LD can be imposed as by then all possible developments are fairly known.
- 1.11.8.4 The respondent has been wrong to be in a hurry to deduct LD, without deciding his course of action with the contractor. It should be noted that the contractor can perform under LD, until it reaches maximum after which time, the contract period becomes undefined, which is generally termed as 'time at large' situation, unless the cause of delay can be clearly attributed to the contractor. This situation is advantageous to the contractor and thus action should be taken to avoid this by negotiating and offering EOT or taking action to terminate. If

not, the Employer has no action against the contractor, after the maximum LD is reached and has to watch what the contractor does.

- 1.11.8.5 The Employer had not been sure of his actions with the contract and acted on a day-to-day basis without thinking ahead.
- 1.11.8.6 Having imposed LD and then paying back, the respondent had put himself to an unwanted situation, if LD imposing was delayed this would not have happened. As long as the performance bond in full value is in hand, the respondent need not be afraid to give such concessions.
- 1.11.8.7 As per the contract the Employer has to pay the IPC value within 14 days of receipt of the IPC. [21 days for certification + 14 days for payment = 35 days; ref. sub clauses 14.5 & 14.6] EOT request has to be approved or rejected by the Engineer or would have asked for further information, of which nothing is mentioned in the arbitration process by either party. ["within 42 days after receiving a claim the Engineer shall respond"]
- 1.11.8.8 Thus, the Engineer has not been late for approval of EOT as the claimant says the delay was 37 days.
- 1.11.8.9 The deducted amount is agreed as 1,737,691 /=. Due date of payment is after bill [IPA 19] as seen because by the time the Engineer should have approved EOT falls on 42 days +29/01/x+1 = 12 /03/x+1.
- 1.11.8.10 The payment for IPC 19 was made on 05/03/x+1. So, the corrected payment cannot be done.
- 1.11.8.11 The date of this payment is recorded by the claimant as 10/03/x+1 earlier than 12/03/x+1. So, the payment has been made by the Engineer within justifiable longest period

1.11.9 Arbitrator's decision

- 1.11.9.1 The payment has been done 02 days before the last date the Engineer should evaluate and give EOT recommendation.
- 1.11.9.2 THE CLAIM IS REJECTED.

1.12 Dispute 11-- Delay in making payments under IPC and compensation for them

1.12.6 Claimants' contention

- 1.12.6.1 A few interim claims were paid after the due date [SOC]
- 1.12.6.2 A Few interim claims were paid after the due date [SOC]
- 1.12.6.3 Hence the interest due is 513,690/= LKR.
- 1.12.6.4 Main dispute here is the applicable interest rate [SOD]

- 1.12.6.5 Claimant wished the arbitrator to select the right rate of interest [ref. Claimant's Issues - claimant's reply in proceedings]

1.12.7 Respondent's stand

- 1.12.7.1 Respondent agrees to pay interest as per sub clause 14.7, for delayed payments.
1.12.7.2 Details of such delays are given in table 1 of SOD.
1.12.7.3 SLFR rates from central bank are given in annex in SOD.
1.12.7.4 Confirmation received from CIDA -available with respondent was tabled.
1.12.7.5 The respondent agrees to pay 183,570/= as delay interest of interim payments as per calculation in table 8 of SOD.

1.12.8 Arbitrator's reasoning

- 1.12.8.1 The contract does not specify any value for interest rate in contract data
1.12.8.2 But sub clause 14.7 refers as "the contractor is entitled for financial charges compounded monthly on the amount unpaid during the period of delay." And also, "Interest shall be calculated for the date by which the payment should have been made up to the date when the payment is made at the prevailing interest of 1% over the lending rate of the Central bank to commercial banks".
1.12.8.3 The lending rate is much less than the cost of financing, if a contractor has to find cash by a temporary overdraft from a bank which is presently around 16%, which slightly varies from bank to bank.
1.12.8.4 As explained above under dispute 2 the arbitrator directs two interest rates for the payments,
 - During the original contract period as in sub clause 14.7 and
 - At legal interest rates for payment after the initial contract period.
1.12.8.5 The delayed payments are as given in table 1 of SOD according to respondent and those in SOC are the delayed according to claimant. Further clarifications too give these payment dates. Matching data is selected by the arbitrator from these tables.
1.12.8.6 As some items are considered for interest payments for the **difference between arbitrator recommended and values certified by Engineer only**, in dispute 2 onwards, the IPC values can be recommended for applying interest for the full IPC value.

1.12.9 Arbitrator's decision

- 1.12.9.1 8 Nos. IPC payments out of 25, are delayed; the financial cost will be paid at relevant interest rates.
1.12.9.2 The amount **due is 484,100/= LKR**

1.13 Dispute 12-- IPC payments were made in haphazard manner by withholding certain percentage of work

1.13.6 Claimant's contention

- 1.13.6.1 In the adjudication process the respondent agreed that some IPC are to be corrected and the respondent prepared a comparative statement on 30/09/x+1.hence the interest claim on this delay is 254,556/= LKR [SOC]
- 1.13.6.2 Calculation summary is given in page 581 in table form in SOC.
- 1.13.6.3 The claimant does not accept the comparative statement in SOD.
- 1.13.6.4 **In response to arbitrator's request for additional preliminary items to be found other than those in respondent's comparative statement, the claimant informed the arbitrator to decide**

1.13.7 Respondent 's stand

- 1.13.7.1 Table 3 in SOD gives the said detail.
- 1.13.7.2 The respondent does not accept the claim in dispute 13 and intend to provide reasons for deductions and they are not haphazard deductions.
- 1.13.7.3 A corrected comparative statement has been prepared by the respondent and given in column 7 of table 9, in SOD.
- 1.13.7.4 "The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate"
This was clearly stated under COC clause No 14.5.
- 1.13.7.5 " The delay interest is only for the payable amount to the claimant for a particular IPC. The recommended amount is available according to that; from the payment certificate payable amount can be found. Similarly corrected total value of the IPC by preparing another payment certificate, the actual payment due can be identified. The diffidence between the Corrected and paid amounts gives the value of payment due to the claimant from the particular IPC. Accordingly, all IPCs were corrected and from these values the comparative statement table 9 was prepared under dispute 13 page 434 of SOD".
- 1.13.7.6 Respondent holds his position as in SOD.
- 1.13.7.7 **In response to arbitrator's request for additional preliminary items to be found other than those in respondent's comparative statement, respondent informed as no other item.**

1.13.8 Arbitrator's reasoning

- 1.13.8.1 It is a fact that some payment deductions are made.

- 1.13.8.2 Whether they are haphazard, purposely made, genuine errors etc. are not of importance at this stage.
- 1.13.8.3 The need is to identify the deductions that need be corrected, amount involved and the days of delay.
- 1.13.8.4 Payment of interest is accepted by all; details only are not agreed
- 1.13.8.5 The arbitrator states that the same principle as for other disputes will be adopted to decide rate of interest.
- 1.13.8.6 This dispute includes matters in dispute 7, 8 and dispute 11 too. The claimant has not shown which items are so reduced. The arbitrator has separately added new interest rates for all work specifically pointed under different disputes and all ESR are corrected under dispute 7. All IPC payments as a whole have been compensated for the delays at legal interest rate after the original contract period under dispute 11.
- 1.13.8.7 However, it should be noted that a) The Claimant in Reply to SOD states “in order to simplify the dispute evaluation claimant now agrees to respondent’s tabulation given in SOD, b) The respondent states “.....the respondent holds its position stated in the SOD” as the last sentence under dispute 13

1.13.9 Arbitrator’s decision

- 1.13.9.1 The Arbitrator allows the figures in table 434 as compensation for the cost but the rate of interest will be calculated using legal rate of interest for the period after the initial contract period
- 1.13.9.2 HENCE THE CLAIM IS allowed changing the interest rate only
- 1.13.9.3 Amount **due is 167,590/= LKR**

1.14 Dispute 13 - Dispute over supply and installation of the lift

1.14.6 Claimant’s contention

- 1.14.6.1 The respondent had informed AG elevator Co. as the supplier for 2 Nos. lifts for the price of 8,600,000.00 +2% NBT +15% VAT equivalent to rate of 161 LKR for a US dollar and subject to fluctuation at the time of clearing.
- 1.14.6.2 Claimant also forwarded the same supplier to the respondent.
- 1.14.6.3 Claimant got quotation from this supplier and from another supplier a lower value of quotation. [SOC]
- 1.14.6.4 Claimant and respondent agreed the supply [SOC]
- 1.14.6.5 Rate analysis for this has been submitted in IPA 19, 20 and 21 [SOC]
- 1.14.6.6 Respondent has corrected this assuming 10% profit and overhead with different values in the IPCs; in 19 – 10,047,603 /=; in 20 10,147,603 /= and in 21 8,877,264.00 LKR.

- 1.14.6.7 Claimant does not accept the corrections made by the respondent on this matter.
- 1.14.6.8 The actual amount the claimant paid to the supplier is given in a table in SOC. Claimant makes his claim for this.
- 1.14.6.9 Matters to be resolved are, overhead and profit factor, unprofessional and non-contractual procedure adopted and accommodation of variation of foreign exchange component.
- 1.14.6.10 10% as profit and overhead factor cannot be accepted because the contract data states "percentage for adjustment of provisional sum," & not "*profit and overhead factor for provisional sum*".
- 1.14.6.11 Payments were made directly to the subcontractor by the respondent; but the claimant is entitled for his profit and overhead factor.
- 1.14.6.12 OH & P shall be considered as 32.76% considering the preliminary payments in place of 35 % claimed under dispute 4.
- 1.14.6.13 The claimant was directed to provide the service, based on quotation for 8,600.00 LKR. This has formed an agreement between the claimant and respondent as an offer and an acceptance.
- 1.14.6.14 The approved quotation has the condition that 'our quotation is based on the prevailing parity rate of 1 USD = 161 SLR' [ref. claimant's issue 306 in proceedings accepted by both parties]
- 1.14.6.15 The claimant denies the request for interim order to do rectification as rectification is not referred to the arbitration.

1.14.7 Respondent 's stand

- 1.14.7.1 The respondent nominated AG elevator Co. as the supplier for 2 Nos. lifts vide letter dated 14/9/x-1 [ref. annex P1to P4 of SOD]
- 1.14.7.2 An advance of 5,031,000 .00 was made to the claimant, only for lift on 31/12/x-1, on special permission of Employer, though there is no provision in contract.
- 1.14.7.3 Lift arrived at site on 24/04/x and payment of 7,310,000/- LKR has been made as quoted value less 15% VAT as material at site with IPC 13.
- 1.14.7.4 The item has been claimed as material at site, in IPA 13 to 16 excluding VAT at 85%. Then in IPA 17 and 18 as 8,170,000/- LKR excluding VAT at 95%; Next in IPA 19, LKR 10,147,603/= with the rate analysis.
- 1.14.7.5 In IPC 13 to 18, payment has been 85% of quoted price as materials at site; In 19 and 20 the payment has been more considering civil works involved.
- 1.14.7.6 Due to the delay in installation the respondent communicated with the supplier to find the reason.

- 1.14.7.7 On 09/12/x, the information came from the supplier, the dues to be paid by the claimant in an e mail.
- 1.14.7.8 A series of correspondence indicate the true invoice of the supplier.
- 1.14.7.9 In IPC 21, the Engineer corrected overhead and profit factor as 10% following contract data, on sub item 13.4.b. The claimant accepted the Engineer's letter 14/09/x-1.
- 1.14.7.10 The claimant submitted wrong figures;
- 1.14.7.11 A comparison table of this contradicting costs, is given in page 466 of SOD by respondent.
- 1.14.7.12 There is no room to add company overheads and profits to this item as per contract.
- 1.14.7.13 Respondent denies accepting all the calculations made by the claimant on this dispute.
- 1.14.7.14 Respondent requests the arbitrator to make an interim order to the claimant to execute rectifications needed in lift works.
- 1.14.7.15 Since in statement dated 15/10/x; annex P7 page 475 of SOD. CIF **value was mentioned as 40,400 USD and price was given.**

1.14.8 Arbitrator's reasoning

- 1.14.8.1 Claimant states the deduction of mobilization advance from this item payment too is wrong. But this matter had been considered as a general deduction situation under dispute 9 and hence disregarded here
- 1.14.8.2 Only the correct price of lift has to be decided and acceptance of US dollar rate change has to be verified in agreement, as there is no foreign component mentioned in price escalation
- 1.14.8.3 According to sub clause 13.4,
 - 1.14.8.3.1 Each provisional sum shall only be used in whole or in part in accordance with the Engineer's instructions and contract price shall be adjusted accordingly.
 - 1.14.8.3.2 The total sum paid to the contractor shall include only such amounts for work, supplies or services to which the provisional sum relates as the Engineer shall have instructed.
 - 1.14.8.3.3 "The Engineer **may instruct**
 - 1.14.8.3.3.1 Work to be executed by the contractor and valued under sub clause 13.3. [*variation procedure*] **and /or**
 - 1.14.8.3.3.2 Plant material and services to be purchased by the contractor from a nominated subcontractor [as defined in sub clause 5.0] or otherwise and for which there shall be included in the contract price.
 - 1.14.8.3.4 The **actual amounts paid** [or due to be paid] by the contractor AND

- 1.14.8.3.5 **A sum for the overhead charges and profit** calculated as a percentage of these actual amounts by applying relevant percentage rate [if any] stated in the appropriate schedule. If there is no such rate, the percentage rate stated in contract data shall be applied.
- 1.14.8.3.6 The contractor shall, when required by the Engineer produce quotations invoices vouchers and accounts or receipts in substantiation”.
- 1.14.8.4 The arbitrator has reproduced the contract clause here, separating phrases and clauses to bring out the meaning clearly, because the parties have not followed the clause from bid document preparation and execution and payment and even in the dispute resolution process.
- 1.14.8.5 Under sub clause 13.4 b (ii) the overhead and profit percentage shall be the rate given in the contract data if there is no rate agreed or given in the schedules. But the bid document gives under contract data 10% as “percentage for adjustment of provisional sums”, which should have been “percentage for overhead charges and profit allowed”.
- 1.14.8.6 But the respondent made a valiant effort to forget this error and select 10% as allowed overhead charge and profit percentage. **This is totally wrong and rejected by the arbitrator.**
- 1.14.8.7 The submissions and proceedings show that the supplier ‘AD elevator company’ has been nominated by the Employer. Therefore, that part of the clause pertaining to nominated subcontractor should apply here.
- 1.14.8.8 As the subcontractor/supplier including installation is nominated, the Engineer / Employer can have dealings with the party as per sub clause 5. 3 because, the clause says, “The contractor shall pay to the subcontractor the amounts, which the Engineer certifies to be due in accordance with the sub contract”. For that the Engineer should know the subcontract and the terms therein, not necessarily obtained through the main contractor.
- 1.14.8.9 In this contract it has not happened and the Engineer accepted the quotation given by the main contractor and relied upon it [ref. PD’s letter dated 14/09/x-1, in SOC, as same in SOD] as proof of accepted quoted amount and agreed for the contractor to proceed with the supply and installation
- 1.14.8.10 The Engineer has not given any conditions or details in approval at least to say as per clause 13.4.b. The approval letter mentions that, it is cost of supply and installation excluding NBT and VAT. No mention is made of overhead charges and profit. A rate breakup is not given, whether it is the **total cost or basic cost is unknown**. As nothing is mentioned of OH & profit it cannot be considered that this component is included or excluded either. SO, IT BECOMES A MATTER TO BE DECIDED BY THE ARBITRATOR

- 1.14.8.11 This incomplete agreement led to their own interpretations later, by the parties, leading to this dispute.
- 1.14.8.12 In IPC 13 to 18, payment has been 85% of quoted price as materials at site. This initial payment of 7,310,000/- LKR as 85% has led to a situation that the material price of the item is accepted as 8,600,000/LKR which is incorrect for the Engineer to pay
- 1.14.8.13 If the profit and overhead charge shall be 10% as the respondent states in this arbitration process, the payment for the advance or materials at site as the respondent states should have been 90%, or even less considering installation cost. So, there is no basis for these payments made in different IPCs.
- 1.14.8.14 If the Engineer had been sharp in bill [IPA] 13, dated 08/05/x; a percentage payment could have been made for the item including installation as an on-account payment, NOT AS material at site.
- 1.14.8.15 The rate breakup given in IPA 19 is submitted in page 582 to 584 of SOC. The cost given with NBT & VAT is 9,295,775 /= then and overhead factor of 35% is added and again NBT & VAT are added.
- 1.14.8.16 If the contract clause is studied in detail the overhead charges and profit are to be added to the actual cost.
- 1.14.8.17 The actual cost submitted by the respondent in page 475 of SOD dated 15/10/x by the supplier, is not accepted by the claimant as it is unsigned.
- 1.14.8.18 The Engineer has lately found some information about the supplier's claimed cost. Had the Engineer been more involved in the process with the nominated subcontractor, which the Engineer can do, the claimant would not have submitted exaggerated rate break ups, as the respondent continued to blame.
- 1.14.8.19 **In dispute resolution it is not meant to find a wrong doer and punish him. The aim is to find what has gone wrong and do the correction and make any suitable compensation only. Punishments may be pleaded in courts of law; the parties should understand this, as both the parties were alleging of unjust enrichment during the time of submissions & proceedings.**
- 1.14.8.20 **The Engineer accepting the quotation and later checking the actual and creating a situation is not good contract administration.** The contractor trying to **increase the profit by making incorrect values is also totally wrong by ethics of a contractor,** who is given a big responsibility to perform a major work to required standards.
- 1.14.8.21 In proceedings claimant's issue 293, the parties agreed that quotation without VAT and NBT is 8,600,000.00 LKR was approved. So, the contractor proceeded with supply at approved rate. There is no mention of actual cost-plus overhead payment in this approval

- 1.14.8.22 As the claimant pointed out in “reply to SOD”, the acceptance of the quotation has formed an agreement and the respondent should abide by it. Thus, it is correct for the contractor too to do the same and not request overhead charges and profit, which has not been excluded as VAT & NBT
- 1.14.8.23 Therefore, logically the value of 8,600,000 is the quoted price for the item including profit and overheads or not, is UNKNOWN; but surely without VAT & NBT.
- 1.14.8.24 The parties have accepted the dollar rate was 161/- LKR at the time of quotation and 176 /-LKR at the time of clearing in proceedings.
- 1.14.8.25 Any payment delay only has to be compensated by interest payment as per contract clause 14.7. Any under payment becomes a delayed payment until it is corrected. So, all under payments shall be compensated with cost i.e., interest payments
- 1.14.8.26 There is no such clause for deducting interest from the contractor for any overpayment in the COC. It is correct with the principle that a mistake by a party causing a cost, shall bear it.
- 1.14.8.27 Also, it should be noted when delay damages are included in a contract all possible damages are combined and agreed to be covered in the given value per delay. If a pre-agreed rate for damages is there, adding other sundry damages is not accepted as a principle. That is why it is necessary for the Engineer to be sharp and strictly follow contract conditions.
- 1.14.8.28 Though time extensions are given for other reasons, there is no record that lift work was delayed due to the respondent.
- 1.14.8.29 The approval had been given without delay for the supply and installation. Hence any delay in commissioning is not caused by the respondent, though the claimant blames delay in payment, whereas more than justifiable has been paid in IPC 13 dated 08/05/ x. If the claimant used it to settle the nominated subcontractor, delay will not happen.
- 1.14.8.30 It is recorded that the “lift works for the above building have been completed”. Testing and commissioning need be done. The letter is by PD having, No. NP/23/01/03/01/01-01 dated 14/02/x.
- 1.14.8.31 The respondent has forwarded a letter dated 24 /Jan/x from the Claimant, which the claimant has not denied. Accordingly, at the time of quotation the total cost is shown as 8.6 million including installation. The present cost is also given in the same basis at increased dollar rate only. So, very clearly even at the time of installation, the claimant has not included separate OH & P. That shows the request for a higher figure in the arbitration is, only an afterthought of the person who prepared the SOC.

- 1.14.8.32 There is no need to make interim order to the contractor / claimant to do rectification, as he is bound by the contract to do so, whether that matter is referred to the arbitration or not. This arbitration was started while the project was in progress. Hence whatever is to be done under the contract conditions, has to be continued by the parties unless requested differently and approved by the arbitrator for any particular matter.

1.14.9 Arbitrator's decision

- 1.14.9.1 The total cost of supply and installation is considered 8,600,000 LKR at US dollar = 161 /- at the time of quotation. Installation cost is given as 1,132,000 LKR in letter dated 24/ Jan/ x letter by the Claimant.
- 1.14.9.2 Hence corrected to the dollar rate at clearing [176 LKR] shall be applied to supply cost.
- 1.14.9.3 There is no need to consider OH&P separately as explained previously
- 1.14.9.4 The payment for cost of interest shall be at agreed percentage in contract, during the original contract period. This rate shall be applicable until installation is complete, even though it is later than the original contract period because, in this item there is no delay by the Employer/respondent.
- 1.14.9.5 The rate of interest shall be legal rate only for any delay in payments after satisfactory commissioning of the lift. But it is recorded that the commissioning and testing are not done even when the arbitration was in progress. SO, NO INTEREST PAYMENT AT LEGAL RATE IS RECOMMENDED.
- 1.14.9.6 The **compensation recommended is 707,944 /=** LKR.

1.15 Dispute 14-- Delay caused in enjoying the profit anticipated in this contract

1.15.6 Claimant's contention

- 1.15.6.1 The initial contract sum is 152 million LKR.
- 1.15.6.2 At 10% expected profit is 152 million LKR after 15 months.
- 1.15.6.3 Due to delays caused by Employer's risk the contractor could do works for a value of 78,486,509/= in IPA 13 the last one during initial contract period of 25 months. So the profit gained is 7,848,650/= at 10%.
- 1.15.6.4 Therefore, the loss of profit = 15,200,102.00 - 7,848,650/- = 7,351,451/-
- 1.15.6.5 The interest on this up to 31 /August/ x+2 is 2,735,948/=
- 1.15.6.6 There is no basis given; the respondent has accepted all reasons given and allowed EOT.

1.15.7 Respondent 's stand

- 1.15.7.1 All delays are not caused by the respondent/Employer's risks.
- 1.15.7.2 The initial contract sum is 152, million LKR to be earned in 15 months as per the original contract.
- 1.15.7.3 The mobilization advance which is given interest free, is not yet fully recovered because of slow progress after many years.
- 1.15.7.4 Excusable and compensable delays occurred only for 101 days;

1.15.8 **Arbitrator's reasoning**

- 1.15.8.1 The claimant's expectation of 10% profit is fair and reasonable as an expectation.
- 1.15.8.2 Expectations do not materialize in real life at most of the time.
- 1.15.8.3 Even when projects are completed without delay, contractors do not get expected profit due to various reasons.
- 1.15.8.4 It is correct that there is no analysis and basis given for allowing EOT; compensable and other are not identified and just EOT is given. But it does not mean that the contractor did not contribute at all for delays
- 1.15.8.5 Loss of profit cannot be attributed to the time extensions given; there is no logic in it.
- 1.15.8.6 Loss of profit can be considered if a big reduction in the scope is seen after the completion of the project, due to big errors in BOQ quantities and any omission orders given, as preventing reasons for the contractor to perform the full scope.
- 1.15.8.7 The basis of the claim is meaningless

1.15.9 **Arbitrator's decision**

- 1.15.9.1 The claim is rejected as the final value of work done compared with the original BOQ scope, is approximately close as seen in IPC 25 and 28 [further clarification given for stage 2, by the parties] the actual value is unknown yet because the claimant did not include this dispute in stage 2.
- 1.15.9.2 THE CLAIM WILL NOT BE CONSIDERED

Summary of claim vs. award

Dispute No	Description in brief	Amount claimed in million LKR	Amount awarded in million LKR
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1	Entitled Extension of time was not granted	-----	
2	Refusal to pay the items P4, P8, P13 given under preliminaries during the initial contract period [awarded 0.01, 0.08 and 0.06 in the same order]	1.6	0.15
3	Refusal to pay items P1, P2, P5, P8, P13 given under preliminaries beyond the initial contract period & compensation due to late recognition [awarded, 0.06, 0.01, 0.06, 0.68 and 0.06 million in the same order = 0.87 million]	4.5	0.87
4	Additional overheads incurred during the period beyond the initial contract period	59.9	7.88
5	Compensation as a result of deleting / omitting major items of work	7.3	0.00
6	Refusal to accept the revision of rate submitted, over change in specification of contract item J1	9.1	0.00
7	Payment reduction of extra works, as a result of Engineer not being able to finalize the payment in the stipulated time in the contract [ESR ...Nos.]	5.0	2.33
8	Provisional sum payments are not satisfactory for item No. V speaker system, No. VI a telephone PABX system No. VI b Data Batch Panel, No VIII CCTV	6.1	1.97
9	Reduction for mobilization advance recovery from the extra scheduled works and provisional sum items	1.0	0.00
10	imposing Liquidated Damages Wrongly and subsequent reimbursement without compensation	0.04	0.00
11	Delay in making payments under IPC and compensation for them	0.5	0.48
12	IPC payments were made withholding certain percentage of work	0.2	0.16
13	Dispute over supply and installation of the lift	6.8	0.70
14	Loss of profit anticipated in this contract	2.7	0.00
	Total [please note the exaggeration in claiming]	103.9	14.5
	Deductions		
1	On account payment against the award directed by the arbitrator	5.00	
2	Arbitrator fee paid on behalf of the claimant	-----??-	
3	Proportionate LD deductible for the road work from 31/ January / x +1 and canteen work from 21/02/x+3 to the date	0.10	

	of taking over-20/04/x+3 [No LD for different sections of the building occupied & properly used in stages before the end day of ex-gratia EOT has been granted i.e., 31/08/x+3]	0.14	
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Lessons

1. Contract documents should be properly prepared and special conditions given in contract data should not deviate greatly from general practice.
2. Any change in the special clause should not change the intended meaning of the original clause as seen in dispute 3, **a payment clause turned to be a punishment or a deduction clause.**
3. What will be constructed shall be included in the BOQ; all imaginary things should not be included as provisional sums to be changed later and entrusted to others or not used at all such as, section of a building, road and landscaping work etc. in this case. These works can be given out as separate contracts easily.
4. Instructions shall be given completely as practically possible and should not expect the contractor to seek information or instruction to perform work items, as seen in dispute 1, where extension had to be given because, the Engineer gave road construction information under the provisional sum, in 4 instances within about 8 months and contractor's other delays are covered.
5. Extra work should not be given, if the contact is within delay damages period, unless the employer considers to waive off delay damages, as seen in offering road works, to the contractor, who is more than a year behind schedule, to complete the building.
6. Instructions for extra work shall be agreed with the contractor, before allowing construction, unless the work is urgently required or affecting other works already commenced. If rate agreement fails only, the work should be instructed to proceed, for the Engineer to determine the rates which is very likely be a point for dispute; in emergency situations, these may have to be overlooked.
7. Notice to correct should be given, with an agreed short program with measurable mile stones. If not, the contractor takes it as, another EOT given and uses to contractor's advantage when terminated.
8. Always contract conditions should be studied and followed, when instructing or writing letters, especially those matter time, cost or a change in method of construction.
9. Agreed payment times and especially contract stipulated time targets, should be followed; as seen in this case, under many disputes the contractor got interest payment for delays.
10. Distortion and exaggerations are common in claims, submitted in disputes after the construction, than when a claim is submitted fresh during construction.
11. It is better to get the Profit factor, site overhead factor and Head office overhead factor separately from the contractor at the beginning, before disputes or even instructing extra works to avoid situations of exaggerations.

12. If a nominated subcontractor is involved, the Engineer / Employer should be involved, without leaving everything to the main contractor, as in the case of the main contractor selected subcontractor, as seen in the disputes related to the lift and PABX etc.
13. It is good if the reader spends time to grasp the arbitrator's reasoning given in this chapter, in detail with the clauses of general conditions of contract in hand.

Post script

1. The claimant was unhappy having lost more than half of what was allowed in adjudication, but he unwillingly accepted arbitration award based on detailed reasoning

Chapter 4

The dispute:

The selection of 'class of pipes'- DI spigot and socket pipes- and the payment to be a variation or not, were disagreed between the parties

- a) Applicability of pressure class C30 for 450 diameter spigot and socket type DI pipes over pressure class C40 without rate reduction AND Applicable revised price for DI pipe supply due to abnormal USD to LKR conversion rate hike
- b) Entitlement of the contractor/claimant for price escalation for pipes as the Rupee Dollar parity rate is fast varying and no bidder can decide correctly [even approximate] at the time of bid

The background:

The project is pipe works in an extension project, for an existing water supply scheme. The pipelines involved are the service and transmission mains. The work was during the period before corona pandemic. While hearing was on, corona pandemic broke out

The matter of concern is with the transmission main involving the items of 'Supply and delivery of DI pipes, fittings, specials and valves for the transmission main.

The Contract is offered by the Chief Secretary of the province, for bidding, under a foreign funded project. A consultancy company was involved in construction supervision from the time the contract was awarded. The designer was a consultancy company under the supervision of the water board. The water board was not directly involved in contract administration but was participating in meetings as the beneficiary of the project and termed as the client in the project documents.

BOQ description for pipes and specification requirements [special] had a mismatch. The contractor has purchased pipes of different pressure class, which is different from the specification but matching with the general practice of water board in all projects for that size of pipe diameter.

A team comprising of the Contractor and the Engineer et.al; had visited the factory in India for material approval for ordering. The manufacturer had informed the specified class of pipes are not manufactured as such high pressure is not generally expected and if required, it has to be specially made at a special price and after a remarkable delay for setting the manufacturing process.

The Engineer has stood firm for the BOQ description and the contractor took his own decision and ordered pipes and the pipes were imported.

The Engineer has refused approval and the dispute started when the contractor continued to use it at site

The conditions of contract are FIDIC- MDB version 2010 edition

General specification is ICTAD specifications and there are special specifications for DI pipes and specials. There are special conditions too for the contract.

Particular conditions and special specifications as relevant:

{Sub **clause 1.5 priority of documents** in general conditions of contract

- a) *The contract agreement*
- b) *The letter of acceptance*
- c) *The letter of bid*
- d) *Variations [Nos. 1,....etc.]*
- e) *The particular conditions part A [contract data]*
- f) *The particular conditions part B [special conditions]*
- g) *The general conditions*
- h) *The specifications*
- i) *The drawings*
- j) *The schedules and any other documents forming part of this contract*
- k) *Initial environmental examination, Environmental Management plan, Resettlement plan
Gender action plan*

Sub clause 13.8 adjustment for change in cost

*F2 List of non -adjustable elements /inputs: items in general bill, provisional sums, **DI PVC & PE PIPES and fittings, specials and valves** and any other items which do not belong to the category of inputs in table F1*

Special specifications:

6.2.d Specifications for DI pipes and fittings for water supply applications

2.4 Classes of pipes and fittings and pressure ratings. The class of ductile iron pipes and fittings shall be in accordance with ISO2531: 2009 or with EN 545 2010 The standard pressure class designation of DI pipes and fittings shall be as given in table 14 of ISO 2431:2009 or table 16 of EN 545: 2010. The preferred pipe pressure class; Pipes are classified based on the pressure class denoted by "C"

Spigot and socket pipes

- *up to and including 300 mm C40*
- *350 to 600mm [including both] C30*

- Above 600 mm C25

If higher pressure class is required it shall be mentioned specially in the bill of quantities

Bill of Quantities

*Bill No 1 – supply and delivery of DI pipes and fittings specials and valves for transmission main
DI spigot and socket pipes with push fit joints*

Notes

1. All S/S pipes should be of class C40
2. All flanged pipes

The submissions and proceedings:

The submissions are summarized as the stance of either party regarding the subject matter and proceedings are excluded to save on time and space.

1. The contractor's contention in Statement Of Claim [SOC]:

1.1. Selection of pipe class

- 1.1.1. Contractor identified that the notes 1, 2, 3 in BOQ No. 1, supply and delivery of DI pipes, specials etc. are contradictory and erroneous compared to the specifications 6.2.d.- specifications for DI pipes and specials
- 1.1.2. As per particular conditions of contract, priority of documents, specifications prevail over schedules including BOQ. Hence, we priced the BOQ No.1 considering pressure type C30 for 450 mm diameter spigot and socket pipes
- 1.1.3. We made the bid in year x and, the bid was accepted and formal contract agreement signing was done within weeks. Time for completion was 20 months
- 1.1.4. The contractor informed the Engineer of the need to purchase DI items. Local agents for the Indian pipe brand, was approved by the AGM of Water Board. Accordingly, the contractor started import process.
- 1.1.5. The contractor informed the Engineer by letter F/S/H/40 dated 24/12/x, referring that the ISO 2431 clearly stated that pressure class is C30 for 450 diameter spigot and socket [S/S] type pipes & according to the schedule of particulars attached "deviation specifications if any – NONE

- 1.1.6. Hence the contractor informed the Engineer's representative that proposed DI pipes and specials are in accordance with specifications stated in 6.2d.
- 1.1.7. Pre-shipment inspection was done in June/x+1 in India by the team. It was noted that the pressure class for 450 mm diameter pipes is C30 not C40 as in BOQ description. Contractor requested approval for purchase from the Engineer. The Engineer has sent the reply stating "test performed – not relevant".
- 1.1.8. By letter dated 09/07/x+1, water board officer has informed the Team leader for the project that, Initial design requirement too had been C30 and an error has crept in while preparing the BOQ
- 1.1.9. Therefore, the contractor requested the Engineer to approve class C30 pipes by letter F/S/H/ 77 dated 12/07/x+1
- 1.1.10. The Engineer to the contract forwarded a letter to the contractor mentioning that the contractor never requested to use C30 pipes for transmission main and water board has accepted the use of C30 class 450 mm dia. S/S type instead of C40, but at reduced price vide letter date 18/7/ x+1
- 1.1.11. Vide; letter F/S/H/82 dated 07/08/x+1, the contractor informed a) in accordance with Employer's requirement 6.2.d clause 2.4 and ISO 2531:2009 and BS EN 545:2010, correct pressure class is C30, since it was impossible to rely on note No. 1, in BOQ item No. 1 b) BOQ notes are erroneous.
- 1.1.12. The contractor submitted a rate break up of BOQ item for preferred pressure class C30 class pipes as required by the Engineer.
- 1.1.13. As requested by the Engineer, the Contractor submitted prices at bid stage and purchasing stage S/S type 450mm pipes of pressure class for C30 and C40 class. Also, a letter from local pipe agent in Colombo indicating prices in April of year x, which is proof of C40 pipe prices.
- 1.1.14. The Engineer determined a rate for C30 pipes, because use of C30 class pipes is a variation to the BOQ item, which is C40, vide letter dated 04/10/ x+1.
- 1.1.15. This rate is much less than the incurred cost by the contractor. The contractor protested the Engineer's determination by letter F/S/H/105 dated 18/10/x+1.
- 1.2. Revised price due to Dollar rupee parity rate
 - 1.2.1. Under particular conditions, DI pipes and specials are excluded from items for calculating input percentages.
 - 1.2.2. While pricing the bid, the contractor expected the dollar rate to be changing within the first year at a reasonable rate as in recent past.
 - 1.2.3. The actual change within year x, was much more than expected and the contractor wrote to the Engineer with supporting particulars.

- 1.2.4. The contractor as a competitive bidder cannot include, a higher factor of safety considering an abnormal rise in parity rates.
- 1.2.5. In good faith the contractor used a reasonable change in parity rate. Hence it is reasonable for the Employer to consider this unusual situation.
- 1.2.6. The Employer excluding a high price item like DI pipe items and strictly adhering to contract conditions knowing the situation as pointed out in full detail with official document from relevant state organizations, is an attempt of unjust enrichment.

2. The Respondent /Employer's stand in statement of Defense {SOD}

2.1. Selection of pipe class

- 2.1.1. The sub clause 2.4 in page 6-41 in specifications gives the classes of pipes and fittings and pressure ratings. In that, the preferred pressure classes for various pipe diameters are mentioned. But at the bottom it is stated that, "if higher pressure class is required, it shall be mentioned specially in the bill of quantities"
- 2.1.2. The pipe category is thus specified in the bill of quantities item 1.1 of bill No1 as "all spigot and socket [S/S] pipes shall be of class C40. Claimants statement that the pricing has been done as per specification is not acceptable as it is mentioned in the BOQ as described.
- 2.1.3. The contractor was late in project activities including supply of DI pipes and specials as pointed out in, i) notice to correct issued dated 21/ August /x; ii) minutes of meeting in September and /December of year x; iii) notice to correct dated 19/ December /x.
- 2.1.4. The letter F/S/H/40 dated 24/12/x was received but it did not indicate type C30 DI pipes of 450mm dia. will be used. It contained the class of S/S pipes as K9 which is acceptable for C40 [as filled in item 1.6]. Since there was no deviation from specifications, item 1.26 of schedule of particulars filled in as "NONE" was accepted.
- 2.1.5. The contractor submitted by letter F/S/H/si/61 the DI pipe requirement for the transmission main, mentioning S/S pipe class as C40.
- 2.1.6. If there were ambiguities or mismatches the bidder /Contractor should have clarified from the Employer.
- 2.1.7. BOQ Item description when seen as C40, the bidder should not have used the price of C30 pipes, for deriving the rate for that item.
- 2.1.8. In the pre-shipment report No 1, the item had been rejected for being C30 class DI pipes for 450mm diameter size.
- 2.1.9. Until the inspection team revealed, the contractor did not inform the discrepancy of class of pipes.
- 2.1.10. It is true that the AGM of water board agreed that, C30 class can be used for 450 diameter S/S pipes.

- 2.1.11. letter F/S/H/82 dated 07/08/x+1 is a reply from the contractor, to the letter by Employer dated 18/07/x+1 and request by the contractor to finalize payment.
- 2.1.12. The Engineer has acted according to the contract conditions in determining a new rate.
- 2.1.13. If there was ambiguity or discrepancy the contractor should have clarified at the bid stage or before ordering the pipes. There was no request at any stage to replace C40 by C30 class pipes from the contractor.
- 2.1.14. There is no provision for price adjustment for pipes and specials under the contract. The contractor should have read the document properly at the bid stage.
- 2.1.15. It is the Engineer, who is entrusted to interpret any matter in the contract document.
- 2.1.16. Bid evaluation had been done according to bid evaluation criteria in the document.

2.2. Revised price due to Dollar rupee parity rate

- 2.2.1. Exchange rate adjustment is not in the contract.
- 2.2.2. Exchange rates given are to be as per the central bank information.
- 2.2.3. This is a common situation faced by all contractors working in this period, if parity rate change is not agreed in the contract.

3. **The claimant in 'Reply to SOD'**

3.1. Selection of pipe class

- 3.1.1. There was no instruction for the bidders to price the item for Class 40. The contractor was not able to identify the issue before submitting the bid at the pre-bid meeting held on 28/02/x.
- 3.1.2. These "conditions and erroneous notes" in the contract document, is a creation by the project consultant as stated by Water Board officer in his letter dated 09/09/x+1. Therefore, the contractor shall be prevented from exploitation by the Employer.
- 3.1.3. Higher pressure classes to be referred are C50. C64 and 1200 not C40, according to the standards as explained to the employer by letter F/S/H/82 dated 07/08/x+1.
- 3.1.4. Although there is a note in specification, the Employer's requirement is not clearly represented due to errors in BOQ notes and different from technical proposal, as per letter dated 09/07/x+1 by Water Board.
- 3.1.5. Notice to correct issued on 21/08/x, is not for Di pipes and specials. Notice to correct dated 19/12/x has relation to DI pipes and specials. It has been informed and shown that, decisions are not finalized regarding the items and the drawings and designs are not 100% completed for the contractor to finalize the list of items [ref F/S//H/39 dated 24/12/ x addressed to the pipe supplier in Colombo]

- 3.1.6. Vide' letter F/S/H/40 dated 24/12/x the contractor informed with the specification details from the pipe supplier in Colombo, that, a) the standards for pipes and fittings confirm to ISO 2531/BS 4773, BSEN 545 and in these standards S/S type pipes and specials for 450 mm is pressure class C30, b) item 1.6 specifies only the class of listed items and not about the DI pipes and dose not establish DI pipes to be C40, c) therefore, item 1.26 stating "deviation from specification (if any) NONE" stands for the item 1.3 that the required pressure class is S/S class C30 450 mm pipes, d) Attachment 3 of SOD by the respondent does not contain the letter F/S/Si/61 or any list mentioning that class of S/S pipes is C40.
- 3.1.7. It is impossible and impracticable for a contractor to identify all discrepancies in a bid document in the bid period. The Employer should check before issuing the bid documents for such errors.
- 3.1.8. Respondent has not commented on Note. No 2, which is erroneously included in BOQ [ref. SOC item 17.b] contradicting specification section 6.2d clause 2.4.
- 3.1.9. In a meeting held on 31/07/x+1 the Water Board officer informed that the Board used only Class C30 S/S type 450 mm diameter pipes and there is no rate for class C40 S/S type 450mm diameter pipes. The notes in BOQ are wrong.
- 3.1.10. The minutes of this meeting was sent to the contractor but in that minutes the fact that the notes are wrong being accepted is not included.
- 3.1.11. If the C 40 price had been included the contract would have gone to any bidder but at the time of supply the winner of the bid too have to provide Class C40 pipes and the contract sum would have been higher and. Considering that scenario there is no need to reduce the BOQ price rated by the claimant.
- 3.1.12. Therefore, claimant/contractor selecting this class of pipes and water board officer confirming the selection is right, have saved millions for the respondent/Employer.
- 3.1.13. The Engineer's determination of the new rate is wrong and put the claimant in more loss by selecting a ratio analysis. The Engineer could have used actual cost data submitted by the claimant /contractor to arrive at a logically acceptable rate.
- 3.2. Revised price due to Dollar rupee parity rate
 - 3.2.1. Abnormal price hike should be absorbed by the respondent as it is the respondent, who prepared the bid document excluding pipes and specials from price escalation input percentages.
 - 3.2.2. No bidder can expect the future price increases other than extrapolating the previous increments from the parity rate records.
 - 3.2.3. At least this abnormal rise should be considered, because the non -inclusion of pipe items is a situation created by the Employer.

- 3.2.4. Contractor is a risk taker is not an argument for the Engineer to refuse a genuine request. This is a bona fide' situation by the contractor to price the pipes as had been done.
- 3.2.5. Employer is trying an unjust enrichment by this refusal to consider abnormal Dollar price change.

4. Respondent in rejoinder submitted

4.1. Selection of pipe type

- 4.1.1. Water board letter is not a part of the contract; the contractor has to act as per contract and payments are to be made as per contract.
- 4.1.2. Contractual matters should be dealt by the contractor with the Employer and the Engineer not with the beneficiary of the project /client.
- 4.1.3. According to the submitted bid, the contractor has clearly indicated that he is providing C40 class pipes; what the contractor assumed in pricing is not written in the bid document.
- 4.1.4. No such discussion was done at the meeting on 31/07/x+1. The contractor has signed minutes. No correction was made at the next meeting on 19/09/x+1.

4.2. Revised price due to Dollar rupee parity rate

- 4.2.1. Contractor should include all risks in bidding.
- 4.2.2. Contractual principles should be in accordance with the signed contract.

Proceedings are not included here as it is elaboration of matters in submission. Any specific matter arisen may be included with adjudicator's reasoning

5. DB's decision

- 5.1. Applicability of C30 class pipes in place of C40 class pipes is correct, as per international test standards and water board practice, as seen from the letters and the fact that the water board officer recommended use of C30 class pipes.
- 5.2. The Engineer proposed reduced rate is fair and reasonable.
- 5.3. The contractor had made an error in pricing the bid. His statement of the use of C30 pipe price for rate calculation at the time of the bid is not proven beyond doubt.
- 5.4. Excluding a major part of cost in pipes and specials in the price adjustment formula inputs, is unfair. But it had been done willfully and the parties have accepted the method. Therefore, DB has no authority to overrule that.
- 5.5. The Dollar rate too cannot be decided by the DB as the parity rates are not mentioned in the contract; as well the pipes and specials are excluded in price fluctuation formula input percentages.

6. DB's reasons for the decision

6.1. Applicability of pressure class C30 in place of C40 without rate reduction

- 6.1.1. As per BOQ, spigot and socket [S/S] type pipes are to be provided of pressure class C40 & 450 mm diameter.
- 6.1.2. In the order of priority of contract document, specifications are higher than the BOQ in priority.
- 6.1.3. Specifications refer to Test Standards BSEN 545:2010 and ISO2531:2009 and the tables 16 and 14 of the two standards respectively for the class of DI pipes in sub clause 2.4 of section 6.2 d of specifications submitted [SOD].
- 6.1.4. This specification 6.2d is in "Section 1 Employer's requirement" of the contract document.
- 6.1.5. In these documents of test standards, pressure class C40 is not given for 450mm diameter S/S type pipes.
- 6.1.6. But under the same sub clause 2.4 for S/S type pipes of diameter 350 to 600 mm diameters C30 class is specified.
- 6.1.7. Also, underneath this class fixing for the diameter, there is a special note in italics, "if higher pressure class is required it shall be mentioned specially in the bill of quantities".
- 6.1.8. This requirement is met in BOQ as Note No.1 and also as the heading of the BOQ items starting from 1.1 and so on. The heading reads "CLASS C 40 SPIGOT AND SOCKET TYPE PIPES".
- 6.1.9. There is no discrepancy between BOQ and specification.
- 6.1.10. But these specifications are different from test standards which are international standards and manufacturers follow these international standards and not particular specifications, in a project.
- 6.1.11. Unless it is a special situation, and a manufacturer is ready to do a job order production, whatever is the specification, standard items have to be selected in a design.
- 6.1.12. Such special requirement or availability of readymade pressure class 40 standard diameter 450mm S/S type pipes with manufacturers, was not raised by either party during submissions or proceedings.
- 6.1.13. If item 6.1.12 above is correct, there is no choice other than selecting class C30 pipes.
- 6.1.14. Water Board who has a role to play in the project as technical guidance and taking over the project on completion, has accepted the use of C30 class pipes in place of C40 class pipes.

6.1.15. Therefore, the applicability of C30 class in place of C40 class pipes in this situation, is acceptable.

6.1.16. Rate reduction will be dealt separately

6.2. “Claimant /Contractor is correct in his decision to consider pressure class of the 450 mm diameter S/S type pipes as C30 in pricing the bid and to supply the same fulfilling the actual requirement fitting the purpose”

- 6.2.1. This statement will be dealt in 2 parts a) pricing the bid for Class C30 S/S type b) supplying Class C30 pipes fitting the purpose.
- 6.2.2. The bidder could have clarified at the pre-bid meeting or even after, as there had been ample time after the meeting to bid submissions from 28 February to 05 April.
- 6.2.3. Pricing the bid for Class C30 is wrong in the same cage meant for class 40 without correcting or qualifying even as a foot note.
- 6.2.4. What the bidder had in his mind at the time of bidding is only known to the bidder; no other person can challenge it. But whether his assumption is reasonable can be assessed from related items in submission and proceedings of the hearing, using common sense.
- 6.2.5. DB calls attention to the sentence in issues raised by the claimant “Also it is impractical to review all included in the agreement before signing. The Engineer and Employer should understand that the doubts and contradictions may be identified at any stage of the contract and those could not be considered as serious issues until and actual issue arises” This gives a hint to the fact that the matter of discrepancy was found by the bidder at a stage later than the time of bidding.
- 6.2.6. In the clarifications raised by DB at the hearing, Claimant accepted the low rate without qualifying was to win the tender because, stating a condition might result in the Employer may reject as a conditional offer.
- 6.2.7. Regarding the supply of C30 class pipes, following were revealed in the adjudication process.
 - 6.2.7.1. International standards are there for Class 30 S/S type 450 mm diameter pipes. Manufacturers follow these.
 - 6.2.7.2. Water Board uses these in other projects as a general practice
 - 6.2.7.3. Water Board in preliminary design has indicated C30 and while preparing bid documents the C40 class has crept in when the consultancy company prepared the document.
 - 6.2.7.4. By the time of adjudication, pipes are laid and pressure tested and found satisfactory.
 - 6.2.7.5. The only unknown factor is life time.

6.2.7.6. After the water board accepted the use, no person has questioned the life time and hence will not be an issue for the DB to decide.

6.2.8. **Therefore, the introduction of C30 price without any qualifying note in the bid is WRONG.**

6.2.9. **The supply of C30 class pipes is FITTING FOR THE PURPOSE.**

6.3. Rate reduction determined by the Engineer is unfair

6.3.1. The decision is not unfair because of the following;

6.3.1.1. As appears in the bid document the rate is not based on the price of C30 class S/S type 450 mm diameter pipes

6.3.1.2. C30 class pipes have been allowed in the project after the letter by the water board officer in July of year x+1. The letter states “our recommendation is to negotiate a new rate with the contractor”.

6.3.1.3. So, use of C30 pipes is tied to a condition to negotiate a rate. No paying party will negotiate for increasing the rate. Thus, it is obvious it is a reduction that was meant.

6.3.1.4. From the proceedings it did not reveal that, parties had any negotiation for a new rate.

6.3.1.5. The Engineer has determined under the contract clause 3.5 in FIDIC.

6.3.1.6. The contractor has the right to disagree and refer to DB, which had been done.

6.3.1.7. The contractor had submitted the rate break ups and the Engineer used it to derive a rate and the contractor found an error in the calculations of the Engineer.

6.3.2. The DB member derived a rate using the data used by the parties to disagree the paid rate.

6.3.2.1. There is no reason to believe the rate in bid is based on C30 pipe price unless it had been a mistake in selecting pipe prices as the item is clearly for C40 class.

6.3.2.2. The pipe price used should be C40 class.

6.3.2.3. The two rate breakups submitted do not have any other costs except pipe price, duty, profit and overheads.

6.3.2.4. When the pipe class is changed other works do not change such as transport handling etc. Thus, the supplier price for C40 is deducted from the given rate without OH & P factor and C30 price is added and then the profit factor is added to get the new rate.

6.3.3. **When calculated on this basis the Engineer determined rate is slightly high and can be considered to remain unchanged.**

SPECIAL NOTE:

- The contractor's action led to the use of C30 pipes which are fitting for the purpose as done in all Water Board projects.
- It is matching with the special specifications under international standards mentioned in them.
- It is the commercially available standard pipe for the size and type.
- Had the contractor proposed this under sub clause 13.2 under value engineering and the variation is approved, the contractor should get 50% of the cost benefit of the saving created by the proposal.
- Though it has not been done formally **IN EFFECT THE CONTRACTOR'S ACTION CREATED THE VALUE ENGINEERING SITUATION DUE TO WATER BOARD ACCEPTING THE C30 CLASS AND THE DESIGN HAD BEEN THE SAME WHICH WERE REVEALED LATER.**
- So, it is fair to allow this to the claimant. But the DBM refrained giving this in the decision as the claimant had not requested it but tried to get the full cost advantage.
- Had the claimant requested "any other reasonable relief the adjudicator may wish" the DB could have recommended such adoption of value engineering in the decision officially.
- DB mentioned value engineering situation and left it to the parties to agree on an amicable basis without going for arbitration to spend more time and money.

6.4. Entitlement of the contractor/claimant for price escalation for pipes as the Rupee - Dollar parity rate is fast varying.

- 6.4.1.** The contract had been prepared specifically to avoid price fluctuation for pipes and specials.
- 6.4.2.** When a component of work is significantly large in a contract, excluding it in price adjustment is unfair and contrary to the principle of price fluctuation calculation by a formula.
- 6.4.3.** However, if such conditions are purposely included in a tender, it could have been negotiated at the pre-bid meeting failing to get the Employer agreed, the only option the bidder has, is to abstain from submitting the bid.
- 6.4.4.** As reflected for the clarification given for the DB and the proceedings claimant stated the need was to win the tender. If the bidder stated any condition the bid would have been rejected.

- 6.4.5. **So, it is clear that the claimant took a risk may be due to compulsion of having another project in hand, to keep the organization functioning, may be at a low profit margin for this contract.**
- 6.4.6. **When the item is not in the price fluctuation consideration exchange rate cannot be expected for the same item.**
- 6.4.7. **More so because the Dollar –rupee ratio is not mentioned anywhere in the contract document.**
- 6.4.8. **Only thing the plea may be considered by the government, because this type of large increases will drain out the financial stability of contractors. Construction industry of the country needs contractors to be sound to bid for future projects. But it cannot be for a single contractor; such decisions have to be taken for the benefit of the entire contracting community.**
- 6.4.9. **As the Condition is well written in the contract purposely excluding and passing the full risk to the contractor and parties have agreed the DB has to accept the fact that it is contractor's risk because bidding is a voluntary act of a person.**

Lessons

1. Any party wishing to refer a matter to DB, should read the relevant clauses carefully and ensure whether the stand so far taken is absolutely right, because for your haste you are paying some outside person extra money to study what you can do yourself.
2. Anything explicitly given in any part of a contract document cannot be disregarded by any party or DB. If not clearly stated or there is an ambiguity, the Engineer should interpret and if not acceptable, it can be referred to DB. In this instance the matter on Dollar rate and excluding pipe items in price fluctuation consideration are pre-agreed and cannot be changed by state officers who will have to face audit queries.
3. Claimant unsuccessfully, made a valiant effort to prove that he made an assumption to price for C30 class while pricing the bid. It would have been better for the claimant to request 50% of the saving under value engineering, when he knew water board is accepting C30 class pipes.
4. **The statement of claim missed the standard last line in many claims under the pleading" any other relief the DB wishes reasonable", which would have allowed the DB to use value engineering clause.**
5. The contractor should plan immediately to follow with Arbitration which is binding and natural justice and fairness too can be sought in arbitration on matters not explicitly written in contract and when the parties have expressly authorized [ref section 24(4) of arbitration act 11 of 1995], if he feels cost of arbitration is less than what he can get

Post script

2. The claimant was unhappy and was stating that the adjudication is biased and justice was not met but was in doubt to spend further for arbitration
3. The Engineer intervened and explained the Adjudicator's explanation to the Employer
4. The Employer too did not like to spend again for arbitration and had convened a meeting with the contractor and the Engineer
5. The claimant was asked to make an appeal quoting the DB decision and parties agreed to share the cost saving on 50-50 basis
6. The payment was agreed to be done accordingly when the project is completed as the contractor's rate of progress was low by that time

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